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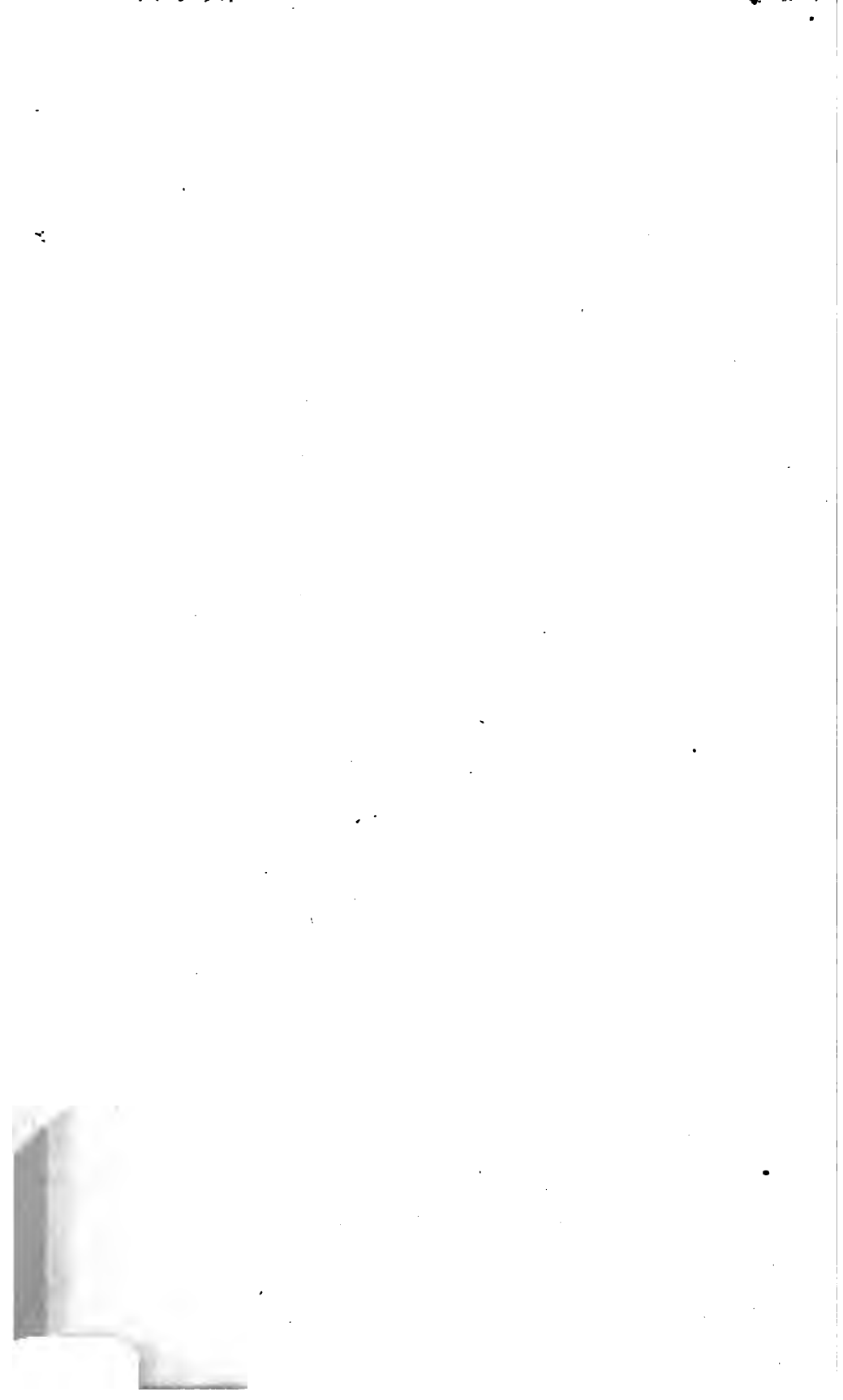
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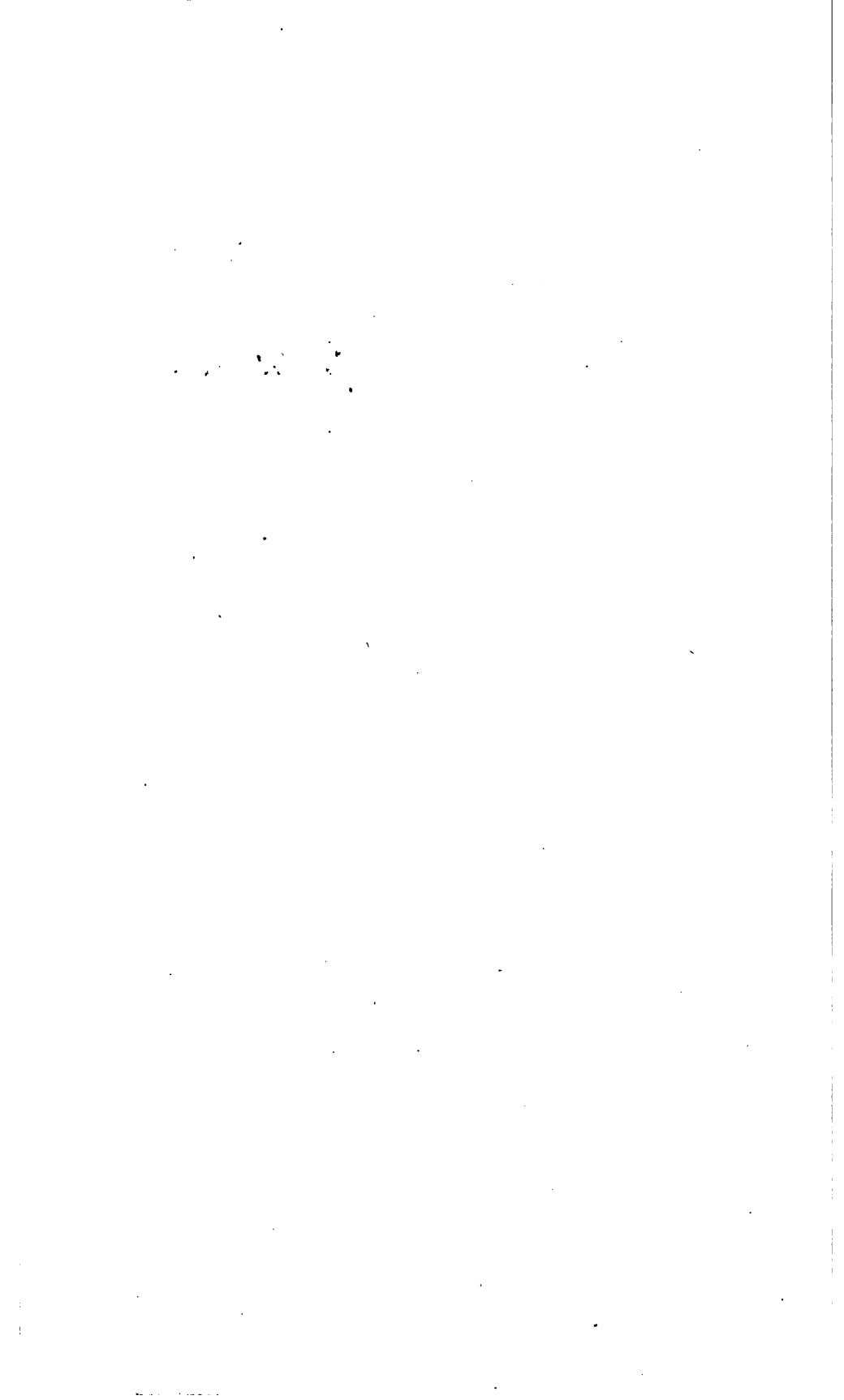


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REPORTS OF CASES

ADJUDGED IN THE

Supreme

COURT OF ERROR AND APPEAL,

BY

ALEXANDER GRANT,

BARRISTER-AT-LAW.

VOL. III.

TORONTO:
HENRY ROWSELL.

1866.

LICHTEN OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

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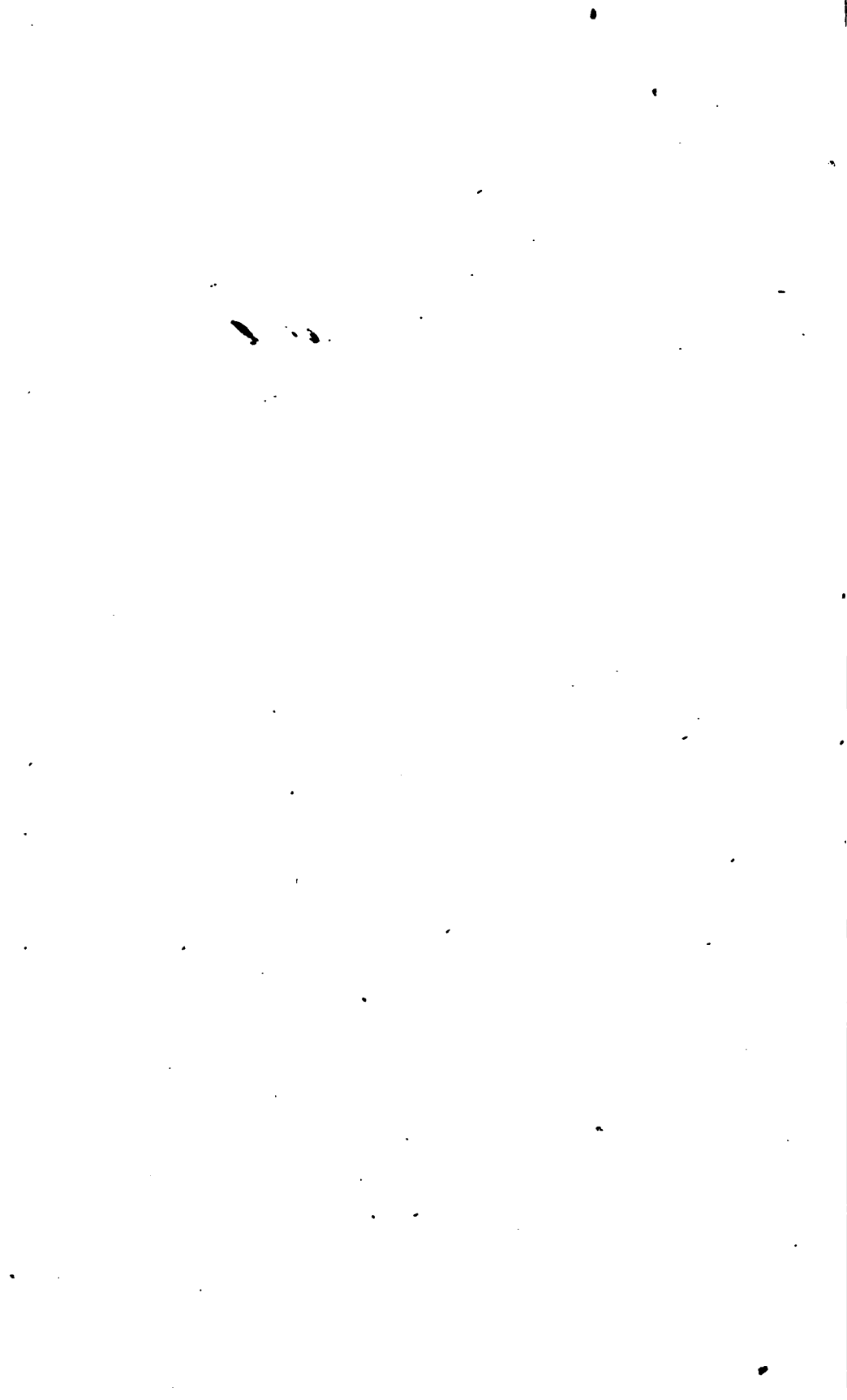
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REPORT OF CASES

IN THE *Mans*

COURT OF ERROR AND APPEAL.

[Before the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Vice-Chancellor Spragge, the Hon. Mr. Justice Hingarty, the Hon. Mr. Justice Adam Wilson, the Hon. Mr. Justice John Wilson, and the Hon. Vice-Chancellor Mowat.]

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

BELL v. MCKINDSEY.

1865.

Lease—Parol evidence.

A lease dated 15th March, 1862, was, in July of the same year, altered in several respects and re-executed by the parties thereto; the date remaining the same, and a memorandum was signed cancelling the first lease.

Held, affirming the judgment of the court below, that the lease spoke from the day of re-execution, not from the day of its date; and that the provisions of the lease, in connection with the surrounding circumstances, did not afford sufficient evidence of a contrary intention to justify a different construction. [*Spragge*, V.C., *A. Wilson*, J. and *Mowat*, V.C., dissenting.]

This was an action against the defendant as sheriff of the County of Halton, by the plaintiff *Mary Ann Bell*, for seizing under a writ of *fi. fa.* goods of her tenant, *William Walker*, and not leaving a year's rent on the premises.

Statement.

1865. The defence was: 1st. not guilty. 2nd. That *Walker* was not her tenant. 3rd. That rent was not due, and (4th) that defendant had not notice of plaintiff's claim for rent.

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v.
McKindsey.

The cause came on for trial before the Hon. Chief Justice *Richards*, at Hamilton, in October, 1863, when the plaintiff put in the lease under which *Walker* had held, dated 15th March, 1862, the material portions of it being in the words following:—

This indenture, made this fifteenth day of March, in the year of our Lord one thousand eight hundred and sixty-two, by and between *Mary Ann Bell*, of the Township of Nelson, in the County of Halton, widow of the late *Nathaniel Bell*, physician and surgeon, of the first part; and *William Walker*, of Saltfleet, in the County of Wentworth, yeoman, of the second part; witnesseth, that for and in consideration of the rents, covenants, conditions and agreements hereinafter reserved and contained, and which, on the part and behalf of the said *William Walker*, his executors, administrators and assigns, are, or ought to be, paid, done and performed, she, the said *Mary Ann Bell*, hath demised, leased, set and to farm let, and by these presents doth demise, lease, set and to farm let unto the said *William Walker*, his executors and administrators, all that parcel or tract of land and premises, situate, lying and being in the Township of Nelson aforesaid, being composed of lot number five, in the first concession, south of Dundas street, containing two hundred acres of land, and one acre of lot number four in the said first concession, adjoining the said first mentioned lot, on which is the dwelling house now occupied by the said party of the first part, together with the said dwelling house, barns, stables and other out-houses thereon erected, standing and being, excepting thereout all the growing timber on the said farm, excepting only such as shall be necessarily used for repairing the buildings and fences on the said farm, and that which shall be necessarily cut for firewood for the use of the house of the said *William Walker*. To have and to hold the said parcel or tract of land, dwelling house, buildings and premises hereby demised unto the said *William Walker*, his executors and administra-

Statement.

tors, from the 1st (first) day of April now next, for and during and until the full end and term of nine years from thence next ensuing, and fully to be complete and ended, yielding and paying therefor unto the said *Mary Ann Bell*, for the first year of the said nine years, the yearly rent of four hundred and fifty dollars *in advance*, that is to say: on the first day of April, one thousand eight hundred and sixty-two, and for every year after the said first year, during the said term hereby granted, the yearly rent or sum of five hundred dollars *in advance*, that is to say: on the 1st day of April, in each and every year during the said term, without any deduction or abatement thereout, for or upon any account or pretence whatsoever.

"By two equal half-yearly payments, to be made on the first day of October and the first day of April."

"By two equal half-yearly payments, to be made on the first day of October and the first day of April."

Provided always, nevertheless, that if it shall happen that the said yearly rent hereby reserved, or any part thereof, shall be behind and unpaid for the space of one year over and after either of the said days hereinbefore mentioned and appointed for payment of the same, being lawfully demanded, or, if the said *William Walker*, his executors or administrators, shall assign over, underlet, or otherwise depart with this indenture, or the premises hereby leased, or any part thereof, to any person or persons whomsoever, without the consent of the said *Mary Ann Bell*, her heirs or assigns, first had and obtained, in writing, under her or their hands, for that purpose; or, if the said *William Walker* shall fail to observe and keep all and every of his covenants and agreements herein contained, then, and in any of the said cases, it shall and may be lawful for the said *Mary Ann Bell*, her heirs or assigns, into the said premises hereby demised, or any part thereof, in the name of the whole, to re-enter, and the same to have again, retain, possess and enjoy as in her and their first and former estate or estates; anything herein contained to the contrary thereof, in any wise, notwithstanding. And the said *William Walker* doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said *Mary Ann Bell*, her heirs, executors, administrators and assigns, in manner following, that is to say: that he, the said *William Walker*, his executors and administrators, shall and will well and truly pay, or cause to be paid, unto the said *Mary Ann Bell*, her heirs, executors, administrators and assigns, the said yearly rents yearly in advance, that is to say:

"Twenty-one days."

Statement.

1865. on the first day of April, at the beginning of each and every year during the continuance of this lease. And also [here follow covenants by the tenant to keep in repair, to do certain specified repairs, for good husbandry, &c., and then the following covenant] that he will, during the present year, and every year hereafter, during the continuance of the said term, pay all rates, taxes and assessments rated, assessed or imposed, or hereafter to be rated, assessed or imposed on, or in respect of, the said farm and premises. [Then the tenant covenants to yield up in good repair, &c., then follows lessor's covenant for quiet enjoyment, then the following covenant by the lessee.] And the said *William Walker* doth hereby for himself, his executors and administrators, covenant, promise and agree to and with the said *Mary Ann Bell*, that he, the said *William Walker*, shall and will, at the proper time and season for that purpose, harvest and carry into the barns on the said premises, for the use of the said *Mary Ann Bell*, all the wheat now growing on the said farm. And it is hereby declared and agreed, by and between the parties to these presents, that the said *William Walker*, his executors and administrators, well and truly paying the said yearly rents hereby reserved, on the days and in the manner herinbefore appointed for payment thereof, and observing, keeping and performing, all and singular, the covenants and agreements in these presents contained, and which, on his and their parts and behalfs, are and ought to be paid, kept, done and performed, shall be allowed, during the last year of his said term, to put in and sow of fall wheat twenty-two acres, and that, after the expiration of the said term, he shall peaceably and quietly enter upon the said premises for the purpose of harvesting and thrashing the same, leaving all the straw on the said farm.

Statement.

In witness whereof the parties to these presents have hereunto set their hands and seals, the day and year first above written.

(Signed,) MARY ANN BELL, [L.S.]
(Signed,) WILLIAM WALKER, [L.S.]

Signed, sealed and delivered }
in presence of
(Signed,) H. R. O'REILLY. }

The plaintiff also put in two loose leaves which, when the lease was originally executed, constituted the 2nd and 4th pages of the lease, in place of the 2nd and 4th pages as it now stands. The words of both being the same, except that the words in inverted commas in the margin originally stood in the place of the words in italics opposite them.

1865.
Bell
v.
McKinsley.

On one of these leaves was the following endorsement:—

“Memorandum.—The lease subsisting and made by and between *Mary Ann Bell* and *William Walker*, bearing date the fifteenth day of March, one thousand eight hundred and sixty-two, for the lease and occupation of the farm of the late Doctor *Nathaniel Bell*, is hereby, by the mutual consent of the parties thereto, cancelled. Witness our hands and seals, this twenty-first day of July, 1862.

(Signed,) WM. WALKER, [L.S.]
(Signed,) M. A. BELL, [L.S.]”

In presence of H. R. O'REILLY.

The subscribing witness to the lease was called, who proved that it was executed about the day of its date, the loose leaves at that time forming the 2nd and 4th pages of it. That *Walker* entered into possession under the lease (as it then stood) before the 1st of April, 1862, and had continued to occupy the premises ever since. About the first July, 1862, and some time before the *fi. fa.* mentioned in the declaration was delivered to the sheriff, *Walker* came to the witness and said he was afraid he would get into trouble, and wanted to secure the plaintiff in her rent. The witness suggested that the rent should be made payable in advance, and that the lease should be altered accordingly. This was agreed upon, and the proposed alteration was then made, by taking out the two loose leaves then constituting the 2nd and 4th pages of it, and inserting what constitutes the 2nd and 4th pages as it now stands, and the lease in its altered form was then re-executed by the parties,

Statement.

1865. and at the same time the memorandum above recited
 was endorsed on one of the loose leaves and executed by
 the parties.

Boil
 v.
 McKindsey.

On the 1st of August, 1862, the defendant, as sheriff, levied on *Walker's* goods, on the demised premises, under the *fi. fa.* mentioned in the declaration. Afterwards, in August, 1862, notice from the plaintiff, in the usual form, of the rent for one year being due, and requiring the defendant to pay the same before the removal of the goods was given, and service thereof on the defendant, on the 18th of August, 1862, and before removal of any of the goods, was proved. At this point the case was stopped, the defendant's counsel objecting, and the learned judge ruling that under the evidence the term commenced on the 1st of April, 1863: that the *reddendum* could only be from the commencement of the lease, and that no rent could accrue until the 1st of April, 1863, and on these grounds the learned judge non-suited the plaintiff, giving leave to move against it.

Statement.

In Michaelmas Term following the plaintiff obtained a rule to show cause why the nonsuit should not be set aside and a new trial had between the parties, on the ground of misdirection of the learned judge at the trial in ruling that the term under the lease to *Walker* did not commence until the 1st of April, 1863, and that, therefore, no rent was due to the plaintiff at the time of the seizure and removal of the tenant's goods by the defendant as alleged in the declaration, which rule, on hearing counsel for the parties, was discharged, at the sittings after term: which decision is reported in the 23rd volume of Upper Canada Queen's Bench Reports, 162.

From this judgment the plaintiff appealed, alleging as grounds or reasons therefor:—

1st.—That before, and at the time when the defendant, sheriff, &c., levied upon the goods and chattels of *William Walker*, the plaintiff's tenant, as in the pleadings mentioned, the said *William Walker* was tenant to the plaintiff of the premises therein mentioned for a term then subsisting and unexpired, and commencing and computed from the first day of April, A.D., 1862, whereas the said court in their said judgment held that the said *William Walker*, at the time of such levy, was not such tenant for such term then subsisting, but only for a term not then commenced.

1865.

Pell
v.
McKindsey.

2nd.—That the lease put in between the plaintiff and *Walker*, bearing date the 15th of March, 1862, should have been construed in respect to the commencement of the term, as speaking at its date, the tenant's occupation under it, and the whole evidence, written and verbal, showing conclusively that the parties, when executing it on that day, and when subsequently re-executing it in its present form, on the 21st of July following, intended it to be so construed, and used the language of it in that sense; whereas the said court, in their said judgment, held the contrary, and held that by reason of the words of the habendum "from the 1st day of April now next," in connection with the time of such re-execution, it could not be so construed.

Statement.

3rd.—That in executing the said lease in its present form the parties used the words of the habendum "from the first day of April now next" in the sense they would naturally import if used on the day of the date, and as if the execution had taken place on that day, as the concurrent verbal and written evidence showed, and the said court should have so construed them, and thereby given effect to the literal terms of the deed, and the intention of the parties truly expressed in it; whereas the said court, contrary to the known meaning and intention of the parties, construed the said words as if used exclusively in reference to the time of the execution,

1865. and thereby, and by importing verbal evidence into the deed as to the time of its execution, changed its legal effect and defeated the intention of the parties.

*Bell
v.
McKinnay.*

4th.—That the time of the execution of the said lease, whether taken in connection with the words of the habendum or otherwise, does not, as was assumed in the said judgment, show conclusively the commencement of the term, which latter is a question of intention, to be gathered from the language of the deed, its application to the subject matter, and the conduct, views and object of the parties, from all which the intention in this case was manifest that the term should commence on the 1st of April, 1862, being the 1st day of April next ensuing the day of the date of the said lease; whereas the said court, in their said judgment, held the contrary, and held that by reason of the words of the habendum, taken in connection with the fact that the lease was executed after the 1st of April, 1862, although dated the 15th of the preceding month, the term necessarily commenced on the 1st of April next, after such its execution, to wit: the 1st of April, 1863, contrary to the literal language of the deed, and the known intention of the parties.

Statement.

5th.—That as the term granted under the original execution of the lease unquestionably commenced on the 1st of April, 1862, and the sole object of its subsequent alteration and re-execution was simply to change the time for the payment of the rent, and not the commencement of the term, no further or other effect should have been given to such alteration and re-execution than was so intended; whereas the said court, in their said judgment, held the contrary, and held that the lease dated and originally executed on the 15th of March, 1862, having been for the purpose aforesaid altered and re-executed after the 1st of April, 1862, that circumstance, taken in connection with the words of the habendum, over-rode the express terms of the deed, and

necessarily, and against the known will and intention of the parties, changed its legal operation, and postponed the commencement of the term to the 1st of April, 1863. 1865.
 Bell
 McKimsey.

6th.—That although it is permitted in a proper case to show by extrinsic evidence that the deed was executed on a day different from its date, for the purpose of effectuating the intention of the parties, which would otherwise be defeated, it is never permitted for the purpose of defeating such intention, which would otherwise be effectuated, and thus, as in this case, to enable one of the parties (or those claiming through him) to effect a fraud upon the other; whereas the said court, in their said judgment, held the contrary doctrine, and held that the words of the habendum “from the 1st day of April now next” must necessarily, and against the known will and intention of the parties, and without regard to the sense in which they used them, be construed the 1st of April next after the execution, and could not be construed the 1st of April next after the date, although the parties were known to have so intended, and the literal words of the deed are in strict conformity therewith. Statement.

7th.—That the verbal evidence shewing that the deed was executed on the 21st of July, 1862, instead of the 15th of March, 1862, (as it reads), taken in connection with the words of the habendum, even if not rebutted or explained, would, at most, only raise a presumption that the time was intended to commence on a subsequent day, say the 1st of April, 1863, and not, as the deed literally imports, on the 1st of April, 1862, which presumption, however, the plaintiff insists was open to be rebutted, and in this case was effectually rebutted, as well by like verbal evidence, (explaining the discrepancy between the date and the day of the execution, and the incongruity arising therefrom,) as also by the deed itself, and especially by reference to its date, the declared date of its execution, and the covenants as applied to

1865. the subject matter; whereas the said court, in their said judgment, held the contrary, and held that such discrepancy and incongruity, arising from the introduction of verbal evidence, could not be removed or explained by verbal or any other evidence.

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v.
McKindsey.

8th.—That inasmuch as the deed in its present form, and construed as if executed on the day of its date, expresses correctly the contract between the parties, and their true meaning and intention, and, if not so construed, it will express a different contract, and the true meaning and intention of the parties be defeated, the parties must be held to have intended and agreed to be bound by the concluding words, declaring that it was executed on the day of its date; (which, in this case, became of the essence of the deed), and they, and those claiming through them, are estopped from shewing that it was executed on a different day, and thus, by verbal evidence, defeat the deed and set aside the contract correctly set forth in it; whereas the said court held the contrary, and held that the defendant, claiming through the lessee, could defeat at once the deed and the contract of the parties, by the introduction of verbal evidence, shewing that the deed was executed on a different day from what it expresses to have been executed.

Statement.

9th.—That because the lease itself appears on the face of it certain and free from ambiguity, and is in conformity with the contract and the plaintiff's rights as claimed by her, the ambiguity or incongruity (if any there be) being introduced by extrinsic evidence: and, because being so raised or introduced, it may be removed in the same manner, and it should, therefore, have been left to the jury to say whether it was the intention of the parties, by the use of the word "next" in the habendum, to mean "next after the day of the date," or "next after the day of the execution."

The defendant, in support of the judgment, relied, 1865.
1st, on the reasons stated in the judgment of the
court below.

Bell
v.
McKindsey.

2nd.—That to support the contention of the plaintiff, the court must hold that at the first day of April, 1862, *Walker* held, under a lease from the plaintiff, at a rent payable yearly in advance, whereas the evidence shews that at that date he held under a lease whereby the rent was made payable at the end of each succeeding half-year.

3rd.—That the court will not hold that a state of facts existed at the first day of April, 1862, which plaintiff admits, and shews did not then exist, nor will a fictitious date be allowed to defeat the rights of third parties.

4th.—That the act of the plaintiff and *Walker*, if construed according to the plaintiff's contention, was an attempt to defeat, delay or hinder creditors, and therefore void as against the defendant claiming *Walker's* goods on behalf of such creditors. Statement.

5th.—That there was no evidence that the lease was intended to operate otherwise than from the time of its execution; and it must in any event take effect from the delivery—not from the date.

Mr. *Miles O'Reilly*, Q.C., and Mr. *Blake*, Q.C., for the appeal.

Mr. *MacKelcan*, contra.

1865. *Smith v. Walton (a), Beaumont v. Field (b), Smith v. Travis (c), Pigott v. Bridge (d), Hedley v. Joans (e), Styles v. Wardle (f), Davis v. Jones (g), Murray v. Stair (h), Poole v. Bentley (i), Doe Cox v. Day (j), Stratton v. Pettit (k), Roe v. Tranmarr (l), Cholmondely v. Clinton (m), Hall v. Hill (n), Bradford v. Romney (o), Iggulden v. May (p), Grey v. Pearson (q), Tatham v. Drummond (r), Doe Hubbard v. Hubbard (s), Clemens v. Henry (t), Addison on Contracts, page 1024, were cited and commented on by counsel.*

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VANKOUGHNET, C.—Thought the appeal must be dismissed: the facts appearing in evidence and the surrounding circumstances being insufficient, in his opinion, to vary the rule of law that a deed speaks, not from the day it bears date, but, from the day of its execution.

Judgment. RICHARDS, C. J.—After giving the case the best consideration in my power, I have arrived at the conclusion that the judgment in the court below is correct.

There is no doubt that *prima facie* the date in any written instrument imports that it was executed on that day, but it may be shewn that it was executed on another day; and it seems to me equally clear, as a general rule, that it can only be an operative instrument from the time it is executed. If by the terms of the instrument the parties agree that something shall be done, or time

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| (a) 8 Bing. 235. | (b) 1 B. & A. 247. |
| (c) 8 Bing. 244. | (d) 1 Vent. 292. |
| (e) 8 Dyor. 307. | (f) 4 B. & C. 908. |
| (g) 17 C. B. 625. | (h) 2 B. & C. 82. |
| (i) 12 East. 168. | (j) 10 East. 427. |
| (k) 16 C. B. 420. | (l) 2 Sm. L. Ca. at p. 450. |
| (m) 19 Ves. 261. | (n) 1 Dru. & War. 94. |
| (o) 80 Beav. at p. 486. | (p) 2 Ves. 325. |
| (q) 6 H. L. Ca. at p. 106. | (r) 10 Jur. N. S. 1087. |
| (s) 15 Q. B. 227. | (t) 10 Ir. Ch. 79. |

calculated from and after the date of the instrument, 1865.
 the date may be referred to as shewing the intention of
 the parties, but that intention must be gathered from
 the instrument itself and the surrounding facts. Now,
 what are the surrounding facts which can properly be
 referred to with a view of ascertaining the intention of
 the parties from the lease itself?

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That there had been a lease between the same parties
 executed on the 15th of March, 1862, and that the
 tenant went into possession of the premises pursuant to
 the lease, and so continued in possession until the 21st
 day of July, 1862, when the parties thought proper to
 cancel that lease and execute the one put in at the trial:
Walker, the lessee, then being in possession of the leased
 premises.

If we are to look at the contents of the cancelled
 lease, of which I have some doubt, we shall find that by
 the terms of that lease, the yearly rent was to be for
 the first year \$450, in half-yearly payments, on the 1st
 of October and 1st of April, and for every year after
 \$500, payable half-yearly on the same days. The term
 by that lease was to commence on the 1st of April,
 1862. The lease executed on 20th July, though dated
 on the 15th of March, is (in other respects material to
 the decision of this case) like that made on 15th March.

Judgment.

The other facts assumed, though I do not see them
 stated in evidence beyond what has been mentioned, or
 are contained in the leases, are that *Mrs. Bell* in March,
 1862, resided in the dwelling-house on the acre of lot,
 number four, included in the lease, and did not so reside
 when the lease was executed on the 21st of July, and
 that there were twenty-two acres of wheat belonging to
Mrs. Bell then on the land, which *Walker* had agreed
 to harvest, and that he also had agreed to pay the
 taxes for 1862. On these facts and the further state-

1865. ment in the lease, that by the *reddendum* the first year's rent of \$450 is to be paid in advance, that is to say, on the 1st day of April, 1862, I am asked to presume it was the intention of the parties that the *habendum* in the lease, instead of being "from the 1st day of April now next for and during and until the full end and term of nine years from thence next ensuing and fully to be complete and ended," means from the 1st day of April last past, and the principal ground on which we are called upon to vary a well settled rule of construction is, that by the lease the first year's rent is made payable in advance, to wit, on 1st of April, 1862; and yet, if the lease itself was not made until after that date, how could it be supposed that it was the intention of the parties that the lessee should do what was impossible, viz., pay the rent on a day that had passed, and that he intended to make a covenant which would either be broken the moment it was made, or which it was impossible that he could perform at all. Now, by the instrument, he is to pay a yearly rent of \$450 for the first year in advance; but in point of interest, in the most favourable view of the case for the plaintiff, the term only commenced on the 21st of July, though in point of time it might have commenced on 1st of April, so that, according to the terms of the lease as now contended for by the plaintiff, the tenant would pay \$450 in advance, not for the first year's rent, but for eight months and ten days rent, and the term, instead of being for nine years, was in fact for eight years eight months and ten days.

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In *Cooper v. Robinson* (a), the *habendum* clearly stated the time from which the lease was to run, and instead of being a lease for fourteen years from its execution, it was only a lease for fourteen years from the day mentioned, and that was only a different mode of saying the term was for twelve years and eight months to come. The fact that the tenant had occupied the land

(a) 10 M. & W. 694.

from the 1st of April, 1862, can make no difference in construing the instrument itself. The case of *Shaw v. Kay* (a), is a strong case on this point. The tenant had been let into possession of the premises in June, 1842; on the 9th of November the lease was made demising the premises from the 22nd of June then last past, with covenants to repair. Immediately after he entered the tenant began to pull down and make alterations in the premises: in an action for breach of the covenant, it was held that he was not liable for acts done before the time of the execution of the lease, though the *habendum* stated the premises were to be held from a day prior to its execution, *Parke, Baron*, referred to a *dictum* of *Eyre, C. J.*, in *Wyburd v. Tuck* (b), as a point on which there could be no doubt that the *habendum* of the plaintiff's lease could only be considered as marking the duration of his interest and its operation, as a grant was merely prospective.

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Judgment.

It does not strike me that making the words now next read now next after the date hereof, will make the instrument more consistent with itself and reconcilable with the legal rules of construction, for then the first payment could not be made, nor the covenant to pay it kept in that view any more than in reading it as last past. I see no difficulty whatever in giving full force to the lease, allowing it to operate from its execution according to its words in their natural sense, except that it may be necessary to reject the words "one thousand eight hundred and sixty-two," after the words "\$450 in advance, that is to say, on the 1st day of April," and also the words "now occupied by the said party of the first part," in the description of the premises which follow the words "on which is the dwelling house." As to the rejection of the latter words, it does not very plainly appear that *Mrs. Bell* was not at the time the lease was executed residing in the house. The

(a) 1 Ex. 412.

(b) 1 Bos. & Pull, 464.

1865. witness said that *Walker* entered into possession under the lease (as it then stood) before 1st of April, 1862, and had continued to occupy the premises ever since. Assuming that he was in possession of the house when the lease was made, I do not see that the lease would not fairly cover that also. The demise is of number five, in first concession south of Dundas Street, containing 200 acres of land, and one acre of lot number four, in said first concession adjoining the said first mentioned lot, on which is the dwelling-house, (omit the *falsa demonstratio*, if you please, as to the party residing in it,) together with the said dwelling-house, barns, stable, and out-houses thereon erected, standing and being. I cannot doubt this would cover the acre of land on which the dwelling, &c., was erected as well as the dwelling itself.

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I see no objection or repugnance to the tenant paying the taxes for 1862. He had at that time occupied the premises for a portion of that year. Then the covenant that the tenant would at the proper time and season for that purpose harvest and carry into the barns on the said premises, for the use of the said *Mary Ann Bell*, all the wheat *now* growing on the said farm. I see nothing objectionable in this, the very reasons which brought about the change of the lease, which do not appear in any way that we can now notice, might have been a sufficient consideration for this covenant, or for the continuing of it in the lease after the change was made; and the fact that the crop was to be put into the barns on the premises for the use of Mrs. *Bell* without providing that she might thrash it there and take away the straw, would seem to imply that she did not require such permission; and if the term was not to begin until the first day of April, 1863, she of course would not require any permission from her lessee to put her grain into her own barn as she thought proper, and thrash it there and dispose of the same. When however the right is given to the tenant to sow in the last year of his term 22 acres of fall wheat, and permission is given to him to

come and cut it and take it away after the expiration of the term, he is also permitted to thrash it on the premises, leaving all the straw on the said farm. The further suggestion is, that the parties did not intend to create an *interesse termini* in *Walker* between the 21st of July, 1862, and the first of April, 1863.

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The difficulty I feel in coming to that conclusion is, that as a matter deducible from the instrument itself and the surrounding circumstances, proper to be considered by me, I fail to see any evidence to raise that presumption against the plain language of the lease itself. Taking the instrument itself, with its express provision that the term commences on the first day of April, now (at its execution) next, the covenants to pay the rent on the 1st day of April, at the beginning of each and every year during the continuance of the lease, with the undoubted rule of law that, unless clearly shewn on the face of the instrument to the contrary, all instruments of this kind speak from the day of their execution, complete effect can be given to every provision in it except the payment of the rent on 1st of April, 1862, (in which respect the same difficulty arises on the construction of the lease as contended for by the plaintiff herself.) I think I would be construing the lease not according to the intention of the parties to be gathered from the instrument itself, but, to use the language of *Lord Kenyon* in *Gerrard v. Clifton* (a), would be "indulging in conjecture and speculation as to any supposed intention of the parties not expressed in the deed," if I were to hold that *now next* applied to the date of the lease instead of the time of its execution.

Judgment.

The case of *Browne v. Burton* (b), seems to lay down the principle which should govern this case. A warrant of attorney under seal bore date on 24th February, 1847, but was not executed until the 20th of March, or

(a) 7 Term Reports, 677.

(b) 5 D. & L. 289, S. C. 12 Jurist, 97.

1865. delivered over to the plaintiff until the 29th of March,
 Bell and the defeasance was for the payment of the principal
 V. sum on the 20th of March next; the plaintiffs issued
 McKimsey. execution ten days after the date, on the 30th of March:
 it was held that the execution was premature, and that
 the money was not payable according to the defeasance
 until the 20th of March, 1848. *Patteson, J.*, in the
 argument, according to the Jurist Report, remarked, "if
 parties will draw up instruments and date them back, I
 do not know that they ought to be allowed to take
 advantage of their irregularity. If the warrant of
 attorney were executed in the presence of an attorney
 he ought not to have allowed the old date to remain,"
 and in giving judgment he said: "the rule uniformly
 acted upon from the time of *Clayton's* case (a) to the
 present day, is that a deed or other writing must be taken
 to speak from the time of the execution, and not from the
 date apparent on the face of it. That date indeed is to be
 Judgment. taken *prima facie* as the true time of execution, but as
 soon as the contrary appears, the apparent date is to be
 utterly disregarded. * * * * Upon the whole, I
 am of opinion that the rule of law is clear that the 20th
 March mentioned in the defeasance must be taken to be
 the 20th March, 1848, *whatever may have been the
 intention of the parties.*" As to the words italicised, I
 assume that the learned judge meant if any such inten-
 tion existed, it was established by evidence outside of
 the documents themselves, which would not be allowed
 to over-ride the rule of law.

SPRAGGE, V.C.—Thought the judgment appealed from
 wrong; but as *V. C. Mowat* had written his views out
 at length, he thought it unnecessary to say more than
 that he concurred therein and in reversing the judgment
 of the court below.

(a) 5 Co. Rep. 1.

A. WILSON, J.—This lease, dated the 15th of March, 1865, to hold from the 1st of April, now next, and not executed and delivered until the 15th of July, 1862, should presumptively and according to *Clayton's* case, commence in interest from the 1st of April, 1863, as the words “now next,” like the word “henceforth” in that case have relation *primâ facie* to the delivery of the lease and not to its date, but this I conceive is only *primâ facie*, and not absolutely and inevitably without regard to the rest of the lease.

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The word *date* “has a definite meaning in general as all the authorities shew, but it may have a different meaning when that is necessary *ut res valeat*,” per *Bayley, J.*, in *Styles v. Wardle (a)*.

So in this case ‘now next’ may also have in general a definite meaning, having relation to the delivery of the deed and not to its date, but I cannot see why such an expression should not be allowed to have a relation to the date of the deed and not to its delivery, when it manifestly appears by the deed that the parties intended it should have such a relation.

Judgment.

The rule of construction is *ex antecedentibus et consequentibus optima est constructio* and by applying it, it appears to me that both according to authority and this deed itself, the words now next should be held to have relation to the date of the deed, so that the term will begin on the 1st of April, 1862, instead of the 1st of April in the following year, and I refer particularly to the language of the Master of the Rolls in *Cholmondely v. Clinton (b)*.

In the premises of the deed it is stated that the lessor is now in possession of a part of the demised premises. In the *habendum* it is said the lessee is to hold from the 1st of April now next.

(a) 4 B. & C. 908.

(b) 2 J. & W. 89.

1865. In the *reddendum* it is said that the lessee is to pay
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 1862, and for every year after *the said first year, &c."*

The lessee then covenants that he will during the *present* year and every year *hereafter* during the term pay all taxes, and that he will harvest and carry into the barns on the premises, for the use of the lessor, all the wheat *now* growing on the farm, and in consideration for his doing this he is to be allowed during the last year of his term to put in 22 acres of fall wheat, and after the expiration of the term to harvest and appropriate it to his own use.

Judgment. All of these expressions and provisions can only be consistently construed by making *now next* have relation to the date; in this manner, for the fall crop which the lessor had put in before the date of the lease, and at the time of the date now growing on the farm, she is to get, and as a recompense to the lessee he is to have the way growing crop of the last year, but in this there would be no meaning if the time is to begin only on the 1st of April, 1863, for no provision has been made about the crop which will *then* or may be then in the ground.

Then again, what taxes are the *present* year's taxes? Are they the taxes of 1862 or 1863? If of the former year, and they manifestly are so, then there are the two provisions as to the harvesting of the crop, and the payment of the taxes which are plainly referrible only to the year 1862.

In looking at the *reddendum* we find all this literally and unmistakably affirmed, for there the rent is to be paid in advance, that is, on the 1st of April, 1862; this is no mistake; it is the very thing which was meant by the parties, and which carries out their meaning; any other interpretation of it will defeat that meaning

and their intention, and it is therefore impossible to reject it upon any ground, if it be possible to give any effect to it, for I cannot believe that this is *falsa demonstratio*. Must such an expression have relation to the delivery only, and so render repugnant all the other provisions of the lease, or can it have relation to the date, by which the whole may be made consistent without striking out or rejecting anything? I know of no irrevocable and inflexible rule of law on the subject.

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The rule is, that where an expression is used in one part of a document in a particular sense, it shall be construed, when occurring in another part of the document, in the same sense, unless another interpretation must clearly be put upon it, *Ridgeway v. Munkittrick* (a). If therefore now growing means 1862, now next, means 1862 likewise.

For the purpose of giving effect to the intention of the parties, the court construed a rent to be a-forehand rent, which made the first payment fall due on the 25th of March, 1828, instead of from it, which would have been on the 24th of June, saying "every reasonable mode of construction must be resorted to for the purpose of furthering the meaning of the parties." *Hopkins v. Helmore* (b). In Doe dem. *Spencer v. Godwin* (c), the proviso of the lease was, if any of the covenants 'hereinafter' contained on the part of the lessee shall be broken, the lessor might enter; and there were no covenants hereinafter by the lessee but only a covenant by the lessor, that the lessee, paying and performing all the covenants hereinbefore contained, should quietly enjoy.

Lord *Ellenborough*, C. J., who with the rest of the court held that hereinafter could not be rejected, because it could

(a) 1 D. & War. 84.

(b) 8 A. & E. 468.

(c) 4 M. & Sel. 265.

1865. not be seen with sufficient 'certainty what the intention of the parties was,' and therefore the letter was adhered to, said, "one thing has induced a doubt in my mind, and it is this, that covenants which respect the enjoyment or the termination of an estate, are covenants that relate to the same subject matter; therefore, if I find hereinafter and hereinbefore in each of them, evidently relating to the same covenants, perhaps I ought to construe them in the same sense as these two covenants respect the period of enjoyment of the estate, I incline very much to construe them together and as relating to the same covenants, in which case hereinbefore in the one would be incorporated with hereinafter in the other, and I should reject hereinafter upon the rule '*ex antecedentibus et consequentibus optima est constructio*,' without professing then to be free from doubt, I think the safest course is to give this instrument a sense according to its letter."

Judgment.

Now to apply this language to the present case. It does appear here that the intention of the parties was to compute the time from the 1st of April, 1862, because they have expressly said so in the *reddendum*, and it is in accordance with the fact of the rent being payable in *advance* of the period of execution in July, 1862, and with the covenant of the lessee, that he will pay the taxes during the present year, and harvest all the wheat now growing on the farm, which, if speaking from the period of date of the lease, must and can only mean the year 1862 as the present year, and as the period referred to under the expression *now*.

The whole context, then, of the instrument shews this to have been the intention of the parties. Then the reasoning of *Lord Ellenborough*, if applied to the case, may be stated as follows: if I find 'now next' and the '1st of April, 1862' relating to the same subject, the enjoyment and termination of the estate, and evidently

relating to the same period, they ought to be construed together, and now next be read as now next after the date, instead of now next after the delivery of the deed. 1885.
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In *Brancker v. Molyneux* (a) it is said: if in pleading, subject A is mentioned and then subject B, and afterwards a statement is made respecting 'the last mentioned subject,' the court will refer these words to A, where by referring them to B an incongruity would be occasioned. It is evident that the lease would have been construed as taking effect from its date if the *habendum* had been from the 1st of April now next *after the date hereof*. See *dem Cox v. Day* (b), and *Styles v. Wardle*.

So I presume it would equally be so if there had been any declaration in the lease in the following words: 'by now next in the *habendum* is meant now next after the date of this indenture, and not after the execution and delivery hereof;' for this would have been equivalent to the express insertion of the words before mentioned of 'after the date hereof' in the *habendum*. Judgment.

Now, according to my reading, there is in this lease what is equivalent to such an express declaration, and therefore the words now next in the *habendum* should be read as applicable to the date, instead of the delivery of the deed, for that this is only a matter of construction is very clear from the previous cases, and also from the following case: that the King's Patent and every Grant of Record shall have relation to the day of the date specified in the record and not to the time of the delivery, because such records are presumed to carry in themselves absolute truth *Ludford v. Gretton* (c).

I am of opinion, therefore, that now next in the *habendum* may be read as referable to the date of the deed,

(a) 1 M. & G. 710.

(b) 10 East, 427.

(c) Plowd, 491.

1865. and that in this case these words should be so read. I do not see that this will create any serious difficulty as to the payment of the rent for 1862; it is true that the deed was not in existence until it was executed in July, and that the rent therefore cannot under it be paid on the 1st day of April, which had then gone by, but the rent I do not think must be lost, it is just as if it had been originally made payable on an impossible day, in which case the payment will become due presently *Giggham v. Purchase* (a). Analogous to the case of a lease provided to take effect from an impossible date, it will take effect from its delivery, *Styles v. Wardle* before mentioned; and it would seem there is no difficulty in maintaining an action upon the execution of the deed for breach of covenant committed before the time of its execution. See *Bird v. Baker* (b), commenting upon *Shaw v. Kay* (c), *Mead v. Davison* (d), *Phillips* on Insurance, 4th Ed. vol. 1, secs. 925-6, *Sutherland v. Pratt* (e).

Judgment.

The interest which a lessee has by common law conveyance before entry, or after the delivery of the lease, and the commencement of his term to begin at a future day, is an '*interesse termini*,' and not an estate; if this lease did not begin till April, 1863, and the lessee entered for any other purpose than to harvest the wheat then growing on the farm, he was guilty of a disseisin, and no continuance of his term after it has rightly begun will purge it or alter his estate. *Cruise's Dig.*, Title viii. c. 1, secs. 15-16, so that he is still liable to be ejected, unless the lessor has waived the tortious entry, by receipt of rent or otherwise; the lease should not therefore be construed, if it can be avoided, to give it such an effect to the prejudice of the lessee by the destruction of his estate.

(a) Noy, 85.

(b) 4 Jur. N. S. 1148.

(c) 1 Exch. 412.

(d) 3 A. & E. 303.

(e) 11 M & W. 296.

From these considerations I think this lease should be so construed as to make the commencement of the term date in computation of time from the 1st of April, 1862, in which case no word or sentence need be rejected, and no violence will be done to any expression, for we shall simply be declaring that the parties meant by the tenor of the whole instrument to make the words now next of the *habendum* have reference to the date of the lease and not to its delivery, which, in my opinion, they have expressly declared they intended to do, and to which therefore effect should be given, as it can properly be done. The judgment of the court below, I think, should be reversed, and the rule of the plaintiff be made absolute, setting aside the nonsuit and granting her a new trial.

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MOWAT, V.C.—The principal question of law argued at the bar was, whether the rule by which a deed is construed, as speaking from the day of its delivery, is so peremptory as to override all evidence of a contrary intention which the deed may supply: or whether such evidence of intention, if clear, overrides the presumption arising from the day of delivery. I look upon the rule as not being an arbitrary rule, but as having been originally adopted, like all other rules of construction, in supposed furtherance of the intention of the parties. There are express indications of this in the reports from a very early period. Thus in *Stone v. Dale* (a), where the plea was that, at the date of the obligation on which the suit was brought, there was no such person *in rerum natura* as the plaintiff, it was adjudged by the whole court for the plaintiff: and it was said that “*primâ facie* every deed is supposed to be made the same day it bears date. But where the date is mistaken, the party may declare, or in his first plea plead, that by a deed bearing date such a day, but *primo deliberatum* at another day, the party granted or became bound, &c. For God for-

Judgment.

(a) Dyer, 348.

1865. bid, when a deed is duly made, that, by negligence or mistake of the clerk in writing the date, the party should lose the whole benefit of the deed and be without remedy." Here I understand the rule is distinctly stated to be designed with a view to carrying out the supposed or probable intention of the parties.

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Judgment.

It is to be observed that the rule itself is against the language of the instrument; and technical reasons of great force might have been given for an opposite rule, had the courts thought proper to adopt an opposite rule; for the instrument in such a case declares under the hands, or under the hands and seals, of the parties, that it was made and executed on the day named in it; and yet parol evidence is received to contradict this statement, and to shew that the instrument was executed on another day; and the date thus ascertained by parol evidence is allowed to control the operation of the deed in construing such words as 'now,' (*Oshey v. Hicks* (a)) 'from henceforth,' (*Clayton's case* (b)) and 'next,' (*Browne v. Burton* (c)) as well as in other respects.

However, the date named, where the delivery was on a subsequent day, is not entirely disregarded; for any reference in the deed to the "date" of it is held, in manifest furtherance of the intention, to apply to the date named in the deed, and not to the date of execution. *Styles v. Wardle* (d), *Doe Cox v. Day* (e), and the cases cited in *Pugh v. The Duke of Leeds* (f). This is all the more significant when the origin of the term date is recollected. "The 'date' is a memorandum of the day when the deed was delivered. In latin, it is 'datum,' and 'datum tali die' is 'delivered on such a day.' * * What is the day of the date?

(a) Cro. Jac. 263.

(c) 5 D. & L. 289.

(e) 10 E. 427.

(b) 5 Rep. 1.

(d) 4 B. & C. 908.

(f) Cowp. 720.

It is the day the deed is delivered." *Pugh v. Duke* of 1865.
Leeds (a), *Hatten v. Ashe* (b).

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It would therefore be contravening the principle of the rule to allow the day of actual delivery to control the language where it clearly appears from the instrument itself, or from those surrounding circumstances which the rules of law permit to be given in evidence, that such a course would defeat the plain intention of the parties. I am not referring to evidence on which it might be conjectured, with greater or less probability, that the parties meant the deed to speak from the date named in it. Conjecture no doubt would not be sufficient. Nor do I speak of an intention made out by parol evidence of the actual agreement as in *Hedley v. Joans* (c). So, also, in regard to the evidence which, in the present or any other case, is afforded by the deed and surrounding circumstances, there may be a difference of opinion as to the amount or sufficiency of such evidence. Judgment. But what seems to me to be clear upon both reason and authority is, that when the intention is clearly made out, is demonstrably shewn, from the instrument, interpreted in the light of surrounding circumstances, such intention ought, on every sound principle of construction, to prevail. I do not see how it is possible to give conclusive weight to a date made out by parol evidence, when the written date is only *prima facie* evidence. There is no just or intelligible purpose that would be accomplished by such an anomaly.

It is the intention which, in construing instruments, the courts are always anxious to ascertain, and to which they give effect as far as they can do so consistently with rules of law: and I do not perceive what sufficient ground there is for holding that the rule of law which the respondent invokes here, overrides all evidence of

(a) Cowp. 720.

(b) 8 Dyer, 438; Anon, 8 Salk, 421

(c) 8 Dyer, 307; and 14 Eliz.

1865. intention which an instrument may contain. I do not understand it to have been contended at the bar that this rule would override any express declaration of intention, however unequivocal, or incapable of being set aside as a mistake of language. I am quite sure there is no authority that would sustain such a position. But the law makes no distinction between what is expressly stated, and what can be made out by clear implication. I apprehend that the true doctrine as to this is as laid down in the admirable judgment of Sir *Thomas Plumer* in *Cholmondeley v. Clinton* (a). After observing that, in the deed there in controversy, however the insertion of a single word of future import in the limitation, in addition to the term "right heirs," as the word "then," or any similar expression, would, it was admitted, have prevented the remainders vesting in the present right heir, and make it a contingent remainder to the future heir, the Master of the Rolls added: "Why so? Because the intention of the grantor, thus manifested in express terms is allowed to govern the construction and effect of the limitation. If intention then is the criterion, when thus manifested, why is it not to be so, when manifested equally as to the proof of the fact, and unexceptionably as to the mode of proof in another way? Can the effect which intention, when ascertained, is to have, depend on the mode in which it is ascertained? Can it make any difference whether it be ascertained by the express or implied sense of the operative words? * *

Judgment.

"To pronounce on the meaning of a detached part of or extract from an instrument, without referring to and comparing it with the other parts of the same instrument, if relating to the same subject, is contrary to every principle of correct interpretation applied to any instrument on any subject, and it is particularly reprobated by all the authorities respecting the construction of legal instruments. *Shepherd*, in his *Touchstone*,

(a) 2 J. & W. 83.

mentions it as one of the established rules for the exposition of deeds, 'that the construction should be made upon the entire deed, so that one part do help to expound another, and that every part take effect and none be rejected: that all the parts do agree together, and there be no discordance therein.' We are to look (as it has been expressed) at the four corners of the instrument, and not to judge *per parcella*.

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"The legal presumption in favour of the present right heirs, does not proceed on the ground of particular intention, but on principles of general application. It will prevail in the absence of any proof of a particular intent, or when that is not very clearly and sufficiently manifested. But when that is manifested, it is contrary to all principle, that presumption should be allowed to operate in opposition to direct proof." * *

"But what are the established rules for the exposition of deeds, and what the limits imposed by them to the adherence to technical terms? For the reasons before mentioned, they are required to be observed to a certain extent, but never so as to interfere with the more important rules in favour of what *Lord Hardwicke* terms the truth and justice of the case. The real intention of the framer of the deed, the written declaration of whose mind it is always considered to be, is the end and object to the discovery and effectuality of which all the rules of construction, properly so called, are uniformly directed. * * Many cases may doubtless be found, in which technical meaning has been allowed to prevail, notwithstanding some appearance of a contrary intent; but this has been where the manifestation of intent was not deemed sufficient, to get over the presumption in favour of legal construction." * *

Judgment.

After an examination of the authorities the learned judge further observed: "I conclude from these authorities (to which many more might have been added) that the

1865. law on this subject is completely settled, and the rules of construction, both of deeds and wills, established in a way not to be shaken: that although there is always a strong presumption in favour of a technical meaning and inference, yet it is no more than a presumption: that it is not necessarily and universally binding and conclusive, but subject to be controlled by the manifestation of a contrary intent: that the primary object of inquiry is the intention of the party: and that when that is on the face of the instrument clearly and satisfactorily ascertained, and found not to be contrary to any rule of law, the court is bound, if the words will admit of a construction conformable to the intention, to adopt that construction, however contrary it may be to technical meaning and inference."

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Accordingly, the law often transposes words contrary to their order, to bring them to the intent of the parties. So, words have been rejected, altered, and supplied; though, as a general rule, words should be received in their natural grammatical import, so as to give effect if possible to every word (Per Lord St. Leonards in *Grey v. Pearson* (a)). With the same view the courts marshal the words of an instrument; as in those cases in which words have been distributed amongst different subjects, *referendo singula singulis*. So, also, the courts hold that if an instrument cannot operate in one form, it shall operate in another which by law will effectuate the intention (*Shepherd's Touchstone*, vol. ii, p. 82).

Judgment.

The very rule that parol evidence is admissible to shew that an instrument (whether under seal or not) was not executed on the day of its date, is perhaps a still more striking illustration of the anxiety of the courts to give effect to the intention of the parties. Very significant also in the same direction is the rule which allows parol evidence to be given to shew that an

(a) 6 H. L. 91.

instrument, however expressed, was not to take effect on delivery, or until some future period, or until some conditions were performed. This last mentioned rule is illustrated in *Murray v. Earl of Stair* (a), which was the case of a bond under seal, and in *Davis v. Jones* (b), which was the case of an instrument not under seal, there being no difference between sealed and unsealed instruments, in regard to the mode of construing them; *Seldon v. Senate* (c). If by parol evidence it can be shewn that an instrument was not to take effect from the execution, how is it possible that the party is excluded from shewing the same thing by the evidence afforded by the instrument itself in connection with the surrounding circumstances? Is not such evidence a far safer guide to the truth than parol evidence of conversations can be? In *Davis v. Jones* (d), *Crowder, J.* said: if the instrument "had been signed and delivered, and no explanation had been given, it would have been taken to speak from its execution. The circumstances of the case clearly shew that this instrument is not to be dealt with in that way. The attesting witness accounted for the want of a date by proving, that the instrument was not intended to be binding from the time of its execution, but from the time of the completion of the repairs. It would be a gross fraud upon the plaintiff if it were otherwise."

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Judgment.

The only cases in which it is said that the rule relied on by the respondent has been applied contrary to the known intention, are *Oshey v. Hicks* (e), *Steele v. Mart* (f), *Browne v. Burton* (g), and *Smith v. Kay* (h). But these cases afford no ground for such an inference.

In *Oshey v. Hicks* (e) the decision was on a demurrer, and was a mere affirmance of the general rule, and could

(a) 2 B. & C. 82.

(e) 13 E. 78.

(e) Cro. Jac. 263.

(g) 5 D. & L. 289.

(b) 17 C. B. 625.

(d) 18 C. B.

(f) 4 B. & C. 272.

(h) 1 Exch. 413.

1865. not, under the circumstances, have been different without denying the rule altogether. The indenture there in question was dated the 9th October, and executed on the 28th, and referred to corn then laden or which should afterwards be laden: and the simple question was whether the rule of law required the word then (or now) to be referred to the day of the date as the plaintiff contended, or to the day of the execution as the defendant contended. It was as impossible for the court to hold that the word referred to the date of the deed as it would confessedly in the present case be impossible to apply in that way the word "next," if the other provisions relied upon for a different construction were not to be found in the lease.

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In *Steele v. Mart* (a) nothing whatever appeared to shew that the intention was that the term should commence from the date inserted in the body of the deed, instead of the date of delivery indorsed upon it.

Judgment.

So, in *Browne v. Burton* (b) there was nothing in the warrant of attorney except the date from which the court could infer that the word "next" had reference to the date of the instrument, and not to the date of its execution. The argument of counsel was against the existence of any rule of referring such words to the time of execution; and of course the argument did not prevail.

In *Smith v. Kay* (c) the question I am now considering did not arise at all. The deed there was executed on the day of its date; and the point was, whether certain covenants to repair could be held to cover acts of the covenantor performed before either the date or the execution of the deed.

(a) 4 B. & C. 7.
(c) 1 Exch. 412.

(b) 5 D. & L. 289.

I am of opinion, therefore, that the rule that a deed is taken to speak as on the day of its execution, is a rule that gives way before sufficient evidence on the face of the deed, or in the surrounding circumstances, that the intention of the parties was to speak from the date of the deed, and not from the day of execution. I respectfully think that the opposite view attaches an exaggerated force to one legal presumption, while it overlooks the principle on which that presumption is founded, and sets aside other legal presumptions equally well settled and possessing a countervailing force.

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McKindsey.

Then is there in the present case sufficient legal evidence that the intention was to speak from the date?

The parol evidence that is admissible of this intention is such as (to use the words of *Lord Wensleydale* in *Baird v. Fortune* (a)) may "shew the condition of every part of the property, and all other circumstances necessary to place the court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument." Accordingly, it was not disputed at the bar that the following circumstances are, on this principle, admissible as evidence to aid in the construction of the agreement which is in question in the present case; what aid they afford I will consider after stating them. There was a former lease between the parties of the same date as the existing lease, namely, the 15th of March, 1862; this lease was the same in all respects as the present lease, except that by it the rent was payable at the end of every half-year after its execution, instead of being payable in advance yearly. When the first lease was executed the lessor was in possession: a few days afterwards the lessee got possession: on the 21st of July the first lease was cancelled, and the new lease, which bears the same date, 15th of March, executed. At the time of the

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(a) 7 Jur. N. S. 926.

1885. execution of the new lease the lessee, and not the lessor,
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 McKindsey. was in possession : the lessee has continued in possession
 ever since.

The point is, When did the term under this new lease commence? The instrument itself, retaining the words of the former lease, states the period of commencement to be "the first day of April now next"; and the defendant contends that this must be taken to mean next after the 21st of July, 1862, when this new lease was executed, and not next after the 15th of March, 1862, when both leases bear date. To decide the point, the question to be considered, in the view which, in common with a majority of the judges of this court, I have taken of the law, is, whether the lease, taken in connection with the surrounding circumstances, affords sufficient evidence that, according to the intention of the parties, the words "now next" have relation to the date of the deed, and
 Judgment. not to the date of its execution? If so, the construction of the deed must be according to the intent.

There are but two things in the lease which were relied upon at the bar as indicating the intention contended for by the respondent, namely (1) that otherwise the term is made to commence from a date which, at the time of the execution of the lease, was past; and (2) that the first payment, in advance, of rent, is appointed for the same day. But I confess I do not feel pressed by either provision. The first is quite common. The second, so far from being inconsistent with the appellant's contention that the lease was intended to speak from its date, was a natural and necessary consequence of such an intention. The rent was due on a day past, just as the term commenced on a day past.

On the other hand, I think I see abundant evidence in favour of the appellant's construction.

The lease describes part of the premises as "now"

occupied by the lessor. It is not disputed that they were occupied by the lessor on the 15th of March, the date of the deed: and it is proved that they were not occupied by her on the 21st of July, the date of the execution. Here then we have perfect certainty that when the word "now" is first used in the lease, the reference is, not to the time of execution, but to the date of the deed. If, then, in describing the property the lease unquestionably speaks as at the date of it, and not as of the day it was executed, how can we possibly say that when, in the next sentence, the reference is to the commencement of the term, the parties should be held to have suddenly dropped that date and to speak as at the day of execution? In this connection *Ridgeway v. Munkittrick* (a) was cited, in which case Lord *St. Leonards* observed: "It is a well settled rule of construction, and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word, where it occurs twice or oftener in the same instrument, unless there appears a clear intention to the contrary."

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Judgment.

This consideration appears to me to be conclusive: and it supports the only construction which is consistent with every part of the deed.

Thus the deed provides for the payment to the lessor (these are the words:) "For the first of the said nine years the yearly rent of \$450 in advance, that is to say, on the 1st day of April, 1862." Here there is an express statement that the term is to commence on the 1st of April, 1862.

The construction insisted upon by the respondent requires the absolute rejection of this provision,—a course which is never taken unless there is no other way of giving effect to an instrument. On the contrary, the maxim is, *Verba posteriora propter certitudinem addita ad*

(a) 1 D. & War. 84, 98.

1865. *priora quæ certitudine indigent sunt referenda.* Any word may happen to be made use of by mistake for another; but is the presumption of a mistake in naming the year, such a presumption as can with any sort of reason be made here? The words "that is to say, on the 1st day of April, 1862," were not required by the sense, and were evidently introduced by the draftsman *ex abundanti cautela*, lest there should be any possible reason for a doubt as to the day on which the term commenced, or on which the first year's rent was payable: and the contention of the respondent is that the very words thus introduced should be rejected, and the term held to commence a year later than these words fixed for it. Is not this making an agreement for the parties, in spite of the utmost certainty that we are thereby rejecting the agreement they have made for themselves? Why insist on retaining the word "next," and on rejecting the year named, 1862? The two expressions have, according to the construction the respondent contends for, wholly different meanings. In preferring one to the other, is the presumption of law on which the respondent relies, or the expressed and unequivocal intention of the parties, that which on sound principles of construction should prevail? Is it not the established rule that the law does not overcome by its implications the express stipulations of the parties? Does not the appellant's construction follow from the maxim "*expressum facit cessare tacitum*"? Is not the opposite construction an infringement of the rule that every word should if possible be allowed to operate in some shape or other?

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Judgment.

Is it not arrived at by confining the attention to a single word "next," and overlooking everything else, however cogent, in the four corners of the instrument? Is not this reversing well settled principles?

It must surely be conceded that the word "next" might naturally have been used by the parties in refer-

ence either to the date of the deed or to the time of its execution, when it may be supposed to have been read, or re-read, to them before being executed; and the law, in the absence of evidence, would presume the reference to be to the day of execution, while the word itself would grammatically refer to the date of the instrument in which the word appears. But the year can have but one signification.

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The other provisions in the lease harmonize with and confirm the same view. Thus, the lease contains a covenant that the lessee "will, during the present year, and every year hereafter during the continuance of the said term, pay all rates, taxes and assessments." Does not this language imply that "the present year" is part of the term? This provision is quite natural and according to usage, if the lessee's term embraced the then present year; but if his term did not embrace the then present year, the provision, though perhaps a possible, is certainly an extraordinary and improbable, provision. I never before knew of a lessee's covenanting to pay taxes during a whole year that he was to have no interest in the property.

Judgment.

Again, the lease provides that the lessee was to harvest and carry into the barns on the premises, for the use of the lessor, all the wheat growing on the farm. This was also a most unusual, and appears to me to be a most unlikely, provision, if it was not till next year that the tenant's interest under the lease was to begin.

I have referred to these covenants to shew which of the two constructions it is that the lease, as a whole, best accords with: and—taking the covenants into consideration, in connection with the first use of the word "now" in indisputable reference to the date of the deed, and not of the delivery; and with the express mention of the year (1862)—I confess that we seem to me to have, on judicial grounds, the clearest demonstration that the

1865: intention of the parties was according to the contention of the appellant; the court below had no doubt that such was the actual intention. Having judicial grounds for holding such to be the intention, we are bound to give effect to it. I am therefore of opinion that the judgment of the court below should be reversed.

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Per Curiam, appeal dismissed with costs.

SPRAGGE, V. C., A. WILSON, J., and MOWAT, V. C.,
dissenting.

[*Before the Hon. W. H. Draper, C. B., C. J.; the Hon. W. B. Richards, C. J. C. P.; the Hon. V. C. Spragge; * the Hon. Mr. Justice Hagarty; the Hon. Mr. Justice Morrison; the Hon. Mr. Justice Adam Wilson; the Hon. Mr. Justice John Wilson; and the Hon. V. C. Mowat.*]

ON AN APPEAL FROM THE COURT OF CHANCERY.

BRIGHAM V. SMITH.

An agreement between two persons that they should carry on business as co-partners in the sole name of one of the two, the other being in debt, and wishing by this means to keep the property from his creditors, does not exempt the partner whose name was used from rendering an account of the partnership dealings to his co-partner.

The plaintiff claimed to be a partner with the defendant in certain transactions set forth in the bill, and to be entitled to certain licenses and timber limits which stood in the name of the defendant. The defendant denied that the plaintiff had any interest in the dealings or property in respect of which the plaintiff claimed relief.

* Was absent from indisposition when judgment was pronounced.

The bill was filed on the 8th of April, 1864, and the 1866.
 cause came on to be heard before The Chancellor,
 at Ottawa, on the 17th of September, 1864, when a
 decree was made for the plaintiff.

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The following judgment, which clearly sets forth the facts, being delivered by

VANKOUGHNET, C.—In the autumn of 1858 the plaintiff being in difficulty and unable to obtain credit in his own name, and his timber limits on the Petawawa River having been mortgaged to one *Aumond* in security for a debt, and having been by *Aumond* transferred to *Burstall & Company*, of Quebec, it seems to have been arranged between the plaintiff and defendant that the latter should carry on the business on the limits in his own name.

On the 3rd of November, 1858, the plaintiff writes to Mr. *Hall*, of Montreal (who appears at this time, and Judgment.
 for some years afterwards, to have acted as the mutual friend of both parties,) in the following words:

OTTAWA, 3rd November, 1858.

MY DEAR JOHN,

Sir,—Joshua has four gangs [of] men now on Petawawa making timber, with every expectation of producing at least two hundred thousand cubic feet for market. He has all required until January next; then will require two thousand pounds currency, to carry the business through to Quebec, and appeal to you to assist us, or him, in getting the required amount. I need not mention how matters stand between *Joshua* and myself, as you before understood them, but I have sold *Joshua* a cut on my limits to the above amount, or upwards, and all the timber cut will be given as security for the above advances. Our wishes are to keep clear from the merchants in Quebec and here, as much as we can, because they are more or less connected. Should you think well of assisting in getting it he will go down, but we would rather you would come up if convenient, as things might be more satisfactorily explained here than in Montreal. All well, with kind remembrance to you and family.

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Mr. *Hall* swears that he did obtain the loan of £2,000 referred to in this letter, but that he represented to Mr. *Wardell*, from whom the money was obtained, that *Smith* was the borrower; and that he did this because the plaintiff was in such bad credit that he could not think of asking any one to lend him money.

On the 30th of December, 1858, *Hall* writes to the plaintiff the following letter :

MONTREAL, 30th December, 1858.

DEAR CORTEZ,—Accompanying you will receive \$2,500, with letter addressed to *Joshua*. In all communications with the firm, to prevent any trouble that might possibly arise hereafter, when you write to the firm on business sign *Joshua Smith* per *T. C. B.* We think it better that to the firm you should not be known in other light than as his agent. The money I sent to *Christy*, I hope, has reached all safe and been properly applied, and in your next shall hope to hear that he has gone up the Petawawa. I omitted one thing in my note to *Wright*, to have the insurance transferred to me. *Christy* agreed to have it done. You will now be in funds. See that mother does not lack for anything to make her comfortable, and I should like you to make frequent trips over and see how they get on. I think there is no doubt but *Grant*, *Wardell* and myself will go up about last next month, and go up to the Petawawa. We would like *Joshua* to be in Ottawa when we are there and go up with us. A day can be named to suit all parties hereafter. We are all well at home, and join me in wishing you and yours a happy New Year.

Yours truly,

JOHN S. HALL.

In acknowledging receipt of money, say when you want more sent, and how much.

The defendant is examined, and he says, that in the autumn of 1858 he owned no limits; that in the winter of 1858 he advanced the plaintiff money to carry on his business; that a part of this money was advanced for material to carry on plaintiff's business in the winter of 1858-59; that he purchased a portion of the limits from

the plaintiff in the autumn of 1858, as referred to in the plaintiff's letter of the 3rd of November, 1858, to *Hall*; but this purchase, Mr. *Lewis*, defendant's counsel, says was merely a nominal thing, and made in the expectation that, by the intervention of a third party, the timber cut on the limits could be saved from seizure under *Burstall's* claim or lien derived through *Aumond*. The defendant also says that in the autumn of 1858 he took possession of the limits, that is the whole limits, and the White Partridge farm, and all the moveable property on both; that the moveable property consisted of forty or forty-five tons of hay, pork, flour, oats, potatoes, blankets, cooking utensils, a few yoke of oxen, some old harness and sleighs, a couple of canoes, blacksmith's tools, and some old broad and narrow axes; that there were several buildings on the farm and from sixty to seventy acres of land cleared. He says he also got from the plaintiff, in the same year, some old ropes, anchors, and chains. He says he understood he was to pay the plaintiff for all these articles, but that there was no direct purchase of them at the time; and that he does not recollect ever making any agreement with the plaintiff to purchase them.

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v.
Smith.

Judgment.

He further says that he took possession of these limits in 1858, in order to hold them for the plaintiff, and that there was no arrangement between plaintiff and defendant, that he, defendant, should have a right to take the timber off the limits, and no agreement that he was to pay for the timber.

He says that he considers that he owns the White Partridge farm, and he admits, that when he took possession of it, there were large improvements upon it, and also upon the limits, which must, he says, have cost a considerable sum of money. He does not know how much, but he puts their value, when he took possession, at one thousand pounds.

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He says plaintiff could not appear in any business, in the fall of 1858, or since, in consequence of his being so involved.

He admits, that he may have got a thousand dollars, of the money loaned by the Trust and Loan Company to the plaintiff in 1860, and that there was no arrangement made as to how long he was to have it, or as to the rate of interest he was to pay for it.

He says he cannot explain the expressions in *Hall's* letter of the 30th of December, 1858, in regard to the plaintiff's position, nor the expressions in *Hall's* other letters, which treat plaintiff as having an interest in the business. He says the plaintiff could not have the moneys borrowed from *Hall* in his own name. He will not swear that *Hall* did not tell him that it was better his firm should not know the plaintiff in the business.

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He says that he went into the business (that is the lumber business on these limits), to get the plaintiff out of his difficulties. He says his horses were kept on the Columbia farm (the plaintiff's farm); that he boarded with plaintiff, but that he never had any arrangement with him about either. He will not swear that he did not say to a Land Surveyor, in Ottawa, that he had got plaintiff's business settled for him, and was carrying it on for the joint benefit of plaintiff and himself. He says that he never rendered plaintiff, nor did plaintiff render him, any account of their mutual dealings. He says he expects to pay plaintiff for all the moveable property he obtained from him—that he paid plaintiff from time to time money, and that his account against the plaintiff appears in the books which were kept at the office on the Columbia farm, and to which plaintiff had access. He admits having received from plaintiff part of the proceeds of a note for £200, made by plaintiff to one *Petrie*, and indorsed by himself.

He says the plaintiff has, since the fall of 1858, been

acting as his agent, without any fixed salary or commission, and that it was a kind of friendly arrangement between them.

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He says he got from one *Clemow* some rafting stuff on account of a debt owing by *Clemow* to plaintiff; that a saddler, whom he sent up to mend the harness used on the limits, boarded with plaintiff, and was paid by him. The defendant denies that the plaintiff had any interest in the business of the season of 1858-9, as strongly as he denies that the plaintiff had any connection with it subsequently.

I have no doubt that the plaintiff was interested in the business of 1858-9, and that it was his business rather than the defendant's; that, in fact, if either was the agent for the other, that defendant was the agent for the plaintiff. I can assign the defendant no higher position during this period than that of partner; and I think that both he and the plaintiff so acted towards one another as to render it difficult, if not impossible, to establish any other relation between them. Their correspondence, together with the action of the witness, *Hall*, as between them, proves that, at the least, the plaintiff had a joint interest in the business. The limits stood in defendant's name, with a view of protecting it from the claim of *Burstall*, the assignee of *Aumond*, the mortgagee of the limits, and with this view only—as defendant, through his counsel, admits—the timber which might be cut during the winter of 1858-9; and the plaintiff assigns a portion of the limits to defendant. The “limits” may be considered in the strictest sense of the term, mercantile property. Their whole value is in the merchantable timber which may be cut upon them—no interest in the land on which the trees grow is possessed by the owner of the limits beyond that which is sufficient to enable him to hold it against trespassers. The limits are the capital—the stock in trade of the lumber man—and this stock in trade, that is as to timber made, I think I must hold the

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1866. plaintiff and the defendant agreed to share in common in the autumn of 1858. It is true that Mr. *Hall* swears that he considered the business from that time as the defendant's, and that in speaking of it as the plaintiff's business, he alluded to him merely as one interested in the defendant's behalf. This explanation is not satisfactory. Mr. *Hall's* letters and his conduct as between the parties, is utterly irreconcilable with the position that the plaintiff had no interest in the business carried on in and with the limits; and although Mr. *Hall's* letters and conduct are of themselves not evidence, as against the defendant; yet, considering the relation of confidence in which both parties placed him as between themselves—that, in fact, he held them both, as it were, in his hands—what he said and did at the time is of much importance and more value, I think, than what he swears to now.

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Judgment. Then, what occurs in 1859? The timber made on the limits during the preceding winter, is seized by *Burstall*. It becomes necessary to procure its release. Nothing can be done in the plaintiff's name, as he is without credit, there being large judgments against him. The plaintiff gives to the defendant a power of attorney to act as his agent to arrange with *Burstall*. *Hall*, as the mutual friend of both parties, intervenes, proceeds to Quebec, arranges with *Burstall*, that defendant shall purchase or take from him the limits in his own name, indorses the defendant's paper to secure the purchase money, and writes to plaintiff that the matter has been closed, and that though it is hard for plaintiff to submit to matters standing as they just then did, he must bear it and wait. Defendant telegraphs plaintiff on the day the matter is finally concluded with *Burstall*—"All settled—make preparations for North Branch." That is the North Branch of the River Petawawa where the limits were situate. Of the money agreed to be paid *Burstall*, £1,100 was paid out of the proceeds of the timber got out from these limits during the season of 1858-9; in which timber,

as already found, plaintiff had at least a joint interest with defendant. The plaintiff goes to work as usual. The defendant deals with him as one having an interest in the business—makes him constant reports of progress—writes to him for supplies and money, and consults him about the disposition of the timber. The plaintiff himself apparently busies himself as usual. He appears to have attended to the financial arrangements, dealing with the bank, and raising money in the defendant's name, as he formerly did in his own, when his own was in credit and available. The teams used in the business of the limits are kept on the farm of the plaintiff during the summer and fall and part of the winter. The defendant himself lives with the plaintiff. The books relating to the business are kept in the plaintiff's house. The book-keeper is there—everything seems to be in common. The plaintiff attends to no other business than that of those limits, unless such attention as he may bestow on the farm, from which the defendant apparently derived as much benefit as he ; and yet the defendant's only explanation of the plaintiff's conduct and position during all this time, and in all these matters, is that it was a kind of friendly arrangement between them.

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Smith.

Judgment.

In the fall of 1858, for the purposes of the business, the defendant took possession of a large amount of valuable chattels of the plaintiff on the White Partridge farm, and used them. No arrangement was had with the plaintiff about them ; no price agreed to be paid for them or for the produce of the "Columbia" farm, or for other things furnished by plaintiff, or for his services in the business ; nothing ever said about plaintiff's being a clerk or an agent ; although defendant now says that he expects and intends to pay for all this ; that is, when it is convenient for him to exclude plaintiff from the business as a partner, he is prepared to pay him for his property, which heretofore, without acknowledgment, he has used and consumed ; and for his services, which he never chose to consider as rendered in any other light than as

1866. under a friendly arrangement, which does not appear ever to have been spoken of.

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When defendant purchased back, or rather redeemed, from *Burstall*, the plaintiff's limits, he was acting as agent for the plaintiff; and with money, to a share of which, at least, the plaintiff was entitled, he paid the whole, or at all events, the larger portion of the first instalment to *Burstall*. Can it be supposed that the plaintiff consented thus to abandon all interest in these limits on which he had spent so much money, and which he had made so valuable?—that he intended or consented to abandon the White Partridge farm, on which he had made so many valuable improvements? And yet the defendant ranks them as having both become his, the farm equally with the limits. What evidence is there that the defendant ever acquired any right in the farm? The defendant claims to be solely interested in the business of 1858–9, equally with that of subsequent years. If his claim to the White Partridge farm and to the whole of the business of 1858–9 be ignored, what value is to be attached to his other pretensions?

Judgment.

I think that the plaintiff must submit to receive the defendant as a partner in the business of 1858–9—say from the first November of the former year, and to treat him as joint owner of the limits from the time of their purchase from *Burstall*, in Nov'r., 1858–9. He has by his own acts, or at all events by his want of some distinct arrangement with defendant, rendered it impossible for the court to give him any higher rights than those of a partner with the defendant.

The limits must be taken, I think, as the joint stock in trade with which the business was carried on between them. Whatever else was furnished by either partner to the business which was carried on between them in partnership from 1858, must be taken into account in the ordinary way, and charged by the one against the other.

And so, also, I think that the White Partridge farm should be treated as having been worked in partnership, and as an adjunct to the business of the limits after the year 1858—not that the defendant acquired any estate or interest in the farm, but that from the nature of the business in which the parties were engaged, and from their dealings with one another, the farm must be considered as having been worked for their joint benefit.

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Smith.

The decree will declare that the business was carried on on the limits from the autumn of 1858, for the joint benefit of plaintiff and defendant in co-partnership; that the limits became the joint property of plaintiff and defendant in November, 1859—when they were conveyed by *Burstall* to defendant; that the farm known as the White Partridge farm has been worked on joint account since and exclusive of the year 1858; and direct the usual accounts to be taken, each partner being allowed for his advances and disbursements, &c.

Judgment.

From this decree the defendant appealed. Counsel did not dispute that the evidence established a partnership, and the argument turned altogether on the other points mentioned in the judgment of the court. On the appeal

Mr. *Blake*, Q. C., and Mr. *Campbell*, for the appellant, cited *Phelan v. Fraser* (a). *McGill v. McGlashan* (b), *Bell v. Peel* (c), *Langlois v. Baby* (d).

Mr. *Fitzgerald*, contra, cited *Shaw v. Jeffery* (e), *Langlois v. Baby* (f), *Darby v. Darby* (g), *Dale v. Hamilton* (h).

(a) 6 Grant, 336.

(c) U. C. Q. B. 1856.

(e) 18 Moore, P. C. Rep. 432.

(g) 3 Drew. 495.

(b) 6 Grant, 324.

(d) 10 Grant, 358.

(f) 11 Grant, 21.

(h) 5 Hare, 369.

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The judgment of the court was delivered by

DRAPER, C. J.—The question of partnership in this case resolves itself wholly into one of fact, and we are of opinion that on the evidence the partnership is established, and the decree is right.

Judgment.

But it has been argued, that in order to claim to participate in the profits of the business, or to establish his position as a partner with the defendant, the plaintiff is compelled to admit, that he agreed that the defendant should carry on the business in his own name, and for his own benefit, in order to defeat, hinder, and delay, the plaintiff's creditors; and that having for this purpose placed himself in the apparent position of being unconnected with, and uninterested in the premises and the transactions carried on, he ought not to be allowed to assert claims on the defendant wholly at variance with that apparent position, conceding the appearance to be false. Or it may be thus stated: the plaintiff was indebted, and he desired to carry on business so as to prevent the interference of his creditors, therefore he made the arrangement for an apparent transfer of his premises and effects to the defendant, the actual fact being that the two were co-partners; and it is urged as this arrangement was made to defeat or delay creditors it is void, and the plaintiff has no rights as a partner.

Admitting, though the evidence on this point is extremely slight and unsatisfactory—much more inferential than direct—that there were creditors to be defeated, &c., and that the agreement was made to prejudice them, we are now dealing with the parties themselves, not with them, or either of them on the one side, and a creditor on the other.

In *Shaw v. Jeffrey* (a) a similar contention was raised, and in giving judgment the Lord Justice *Knight Bruce* observes: "Where an instrument between two

(a) 18 Moore, P. C. 432.

parties has been entered into for a purpose which may be considered fraudulent as against some third person, it may yet be binding according to the true construction of its language as between themselves" (a). And again (b): "A mere suspicion of a fraudulent intention to protect the property against the just claims of other persons, will not suffice to shew that the transaction was wholly colorable as between the plaintiff and defendant themselves; nor if the transaction is a real transaction, such as it appears on the surface as between themselves, will it be vitiated and rendered of no avail because it may have the effect of defeating the claims of other creditors of the plaintiff."

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The case of *Bowes v. Foster* (c) may, at a hasty glance, be deemed at variance with this doctrine, but carefully examined it is entirely consistent with it, and it is treated by every one of the judges on an entirely different principle.

Judgment.

We think it unnecessary to do more than say that we follow the doctrine of *Shaw* and *Jeffrey*, though we might perhaps have felt ourselves justified in refusing to give effect to such an objection when it was not raised in the court below, nor even if I rightly understand them, raised upon the pleadings.

Per Curiam.—Decree affirmed and appeal dismissed with costs.

(a) 18 Moo. P.O. 454.

(b) *Ib.*, 462.

(c) 2 H. & N. 779.

1866.

ON AN APPEAL FROM THE COURT OF CHANCERY.

BETRIDGE V. THE GREAT WESTERN RAILWAY CO.

Specific performance—Ultra vires.

The Rector of Woodstock filed a bill against the Great Western Railway Company for the specific performance of an alleged contract for a free pass for himself and his successors, as the consideration for certain rectory land conveyed by the plaintiff to the company for railway purposes. The Court of Chancery decreed for the plaintiff. The Court of Appeal, not being satisfied with the evidence of the alleged contract, and also deeming the contract to be open to various objections, reversed the decree, and ordered the bill to be dismissed with costs. [SPRAGGE and MOWAT, V.CC., dissenting.]

Statement.

The bill was filed the 23rd of October, 1860. The plaintiff was Rector of Woodstock, and the bill alleged that an agreement between the plaintiff and the defendants, that the plaintiff should convey or procure to be conveyed to the defendants a certain parcel of land, described in the bill, for and upon the consideration that the plaintiff, as rector as aforesaid, and his successors in the rectory, should have the right to travel over the railway of the defendants, in the passenger trains run over the same by the defendants, free of all charges, and should have a first-class free ticket for that purpose; that, in part performance of the agreement, the plaintiff, by deed poll dated and executed on the 26th of July, 1862, conveyed and assured to the defendants the said premises; that the consideration expressed in the deed was the nominal sum of five shillings, which was never paid or agreed to be paid, the real consideration for the same being the said right and privilege to travel free of charge; that no recital of such consideration was inserted in the deed, which was prepared by the solicitors or agents of the defendants; that, in further performance of the agreement, the defendants thereunder took, and have ever since retained, possession of the premises, and are constantly using the same, and have constructed on the same a

portion of their line of railway, and have built earth-works and other erections on, and made excavations in, the same, and have in fact altered the formation of the ground and made the same useful only to their line of railway.

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The prayer of the bill was that the defendants might be decreed to specifically perform the alleged agreement.

The cause came on for the examination of witnesses and hearing before Vice-Chancellor *Spragge*, at Hamilton, on the 27th day of March, 1861, when the following evidence was given :

PETER CARROLL (called by the plaintiff).—I was a director in the Great Western Railway Company at the time a bargain was made with the plaintiff in respect to his rectory land; I was also agent for the company for acquiring land, and Mr. *Gunn* was the company's arbitrator; I made many arrangements for the company; I made some by agreeing on behalf of the company that depots should be established at particular places. Some were confirmed by the company, some were not. *Gunn* and I saw the plaintiff together, and I believe I reported to the company by letter; that was my rule; it was to report periodically what I had done. Paper "A"* is a statement of what passed, which I gave to the plaintiff; to the best of my recollection it stated that he could not, as rector, give the land for a pecuniary consideration, but that he would give it for that which would be a permanent benefit to himself and his successors.

Statement.

*Paper "A" referred to was as follows :

To the President and Directors of the Great Western Railway Co.

Gentlemen—In my capacity as agent and director of your company, authorized by the board to procure the right of way for the road, I agreed to the following proposals from the Rev. Wm. Bettridge, Rector of Woodstock, for the right of way across the glebe lands at that place, viz: Mr. Bettridge thought he had no authority to give the right of way across glebe land without a consideration, and, after some deliberation, it was finally agreed that the company should have the right of way on condition that they give him, the Rector, a free ticket over their road.

This arrangement was made and consented to by Mr. *Gunn* and

1866. *Cross-examined.*—The matter had passed from my mind until I saw papers. I had forgotten the giving of the statement. Upon reading it, it recalled to my mind the understanding that was come to. Mr. *Gunn* and I did not presume to have absolute authority to make such an arrangement. We did not mean to convey that we had such authority, except subject to the approval of the board. I think the arrangement was made as stated in the plaintiff's letters of the 15th of January, 1855, and 31st of January, 1856. I think those letters state correctly what the arrangement was. I am satisfied the plaintiff understood that the arrangement was subject to the approval of the board. The arrangement was distinct, but subject to such approval. I do not conceive that we had authority of ourselves to make such arrangement. I do not recollect making a report to the board of the arrangement with the plaintiff. I acted as agent for the company from 1846 to 1851 I think. I think the arrangement with the plaintiff was in the winter of 1850–51. I left for England in April, 1851.

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Re-examined.—I remember receiving no instructions from the company in respect to the arrangement with the plaintiff. I have no doubt I reported the arrangement to the board.

Statement

To the Court.—The practice of the board was to carry out arrangements through their solicitor. When my arrangements were affirmed I received no notification of it; when they were disapproved of, and an arbitration became necessary, in such case I was usually instructed to notify the parties. This was the usual course when I could get no satisfactory proposal, or the proposal was

myself, being anxious, in all cases where it was possible, to avoid arbitration, and considering that this was but a small consideration.

The above statements are made by the request of the Rev. Wm. Bettridge, for the information of your board.

I have the honor to be,

Gentlemen,

Your most obedient servant,

(Signed) PETER CARROLL.

On the back of this Exhibit is endorsed the following.

As agent of the G. W. R. Co., I was with P. Carroll, Esq., one of the directors of the company, when it was agreed that the Rector of Woodstock should have a pass over the road, free, on granting a deed for the land required across part of lot No. 19, in the 1st concession of East Oxford.

Hamilton, 17th July, 1856.

DANIEL G. GUNN.

not approved by the board. My practice was to attend before the board, and I generally received their verbal instructions. I know no instance of the board making arrangements with the parties with whom I had negotiated. 1866.

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DANIEL C. GUNN (called by the plaintiff).—I acted as arbitrator for the company when the arrangement was made with the plaintiff. I saw the plaintiff along with Mr. Carroll. I think the plaintiff's letters (a), which I have just heard read, give a correct version of what passed. The plaintiff made the proposition, and we thought it reasonable. He gave us distinctly to understand that as Rector he could not sell the land or give it away. We approved of the plaintiff's proposal, and told him that we could not issue passes; that our business was to make arrangements as to land, subject to the sanction of the board, and that we would submit his proposal. We came to a concluded agreement with him, subject to the approval of the board. The instrument or paper "A" is a correct statement of what passed. It was subject to the approval of the board.

Cross-examined.—I do not recollect anything being said of a free pass for any one but the plaintiff himself. The statement is not official, but both the plaintiff and the company of course knew of the letter being written. We did not represent to the plaintiff that we had authority to make the arrangement, otherwise than subject to the approval of the board. Mr. Carroll left for England in April, 1851. Only the one parcel of land was obtained from the plaintiff. We paid twenty-five dollars an acre for the adjoining land. We generally argued that the railway would enhance the value of the rest of the owner's property. I think the plaintiff was favorable to the construction of the road. People on the line were so generally, and we got the land on reasonable terms. The land in question is over a quarter of a mile east of the station. Statement.

Re-examined.—The land in question is within the boundaries of the town of Woodstock. There was an award of £824 for thirty-one acres of land just beyond the limits of the town to the west; part of it was swamp; of this £200 was for crossings; part of it was laid out as for village lots. The land we got at \$25 an acre

(a) These letters are printed post 63, 64, 67.

1866. was not adjoining the plaintiff's, but was in the neighborhood. The land adjoining the plaintiff's on both sides was given free.

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WILLIAM GRAY (called by the plaintiff).—I was one of the churchwardens of St. Paul's, Woodstock, when the deed was made to the company, and when the arrangement was made, and am so still. The plaintiff was and still is Rector of Woodstock. I was present at a meeting between the plaintiff and Mr. *Gunn* and Mr. *Carroll*. The plaintiff stated that as Rector he could only convey the land for what would be a benefit to his successors as well as to himself, and he proposed that he and they should have a free pass. Both Mr. *Gunn* and Mr. *Carroll* seemed satisfied. I attended the meeting officially as churchwarden. When the deed was executed, the plaintiff repeated that the consideration for the deed was that he and his successors were to have free passes. I executed the deed at the same time as the plaintiff. I think it was executed at the rectory. It was brought by the gentleman who witnessed the deed, and he took it away; he was a clerk in the office of Messrs. *Ball* and *Carroll*. The plaintiff made the declaration to him as to the consideration. I am convinced that neither he nor I would have executed the deed but for that consideration. The land was worth at the time as park lots from £30 to £50 an acre. The railway passing through it would be of some injury to it as farm property; it would be a great injury to it if laid out as village property. I think it was available for that purpose. At one time that property might have been sold at £150 an acre.

Statement.

Cross-examined.—The land may now be worth £50 an acre. I think the railway has diminished the value of town and village property. I should think the deed was executed on the day it bears date. My recollection as to what passed at the rectory in regard to the consideration for the land is distinct. I thought that *Gunn* and *Carroll* had authority to make the arrangement.

Re-examined.—I am aware of the plaintiff having been seriously ill since this arrangement, and leaving the country in consequence. He was absent four years in Europe, with the exception of a short time, not more than a few weeks at most.

JAMES IZZARD (called by the plaintiff).—I have lived 1866.
 in Woodstock for several years. I am a land agent, and have sold land all round there. The land in question is about half a mile from the station. I was in Woodstock in 1850, when I left it and returned in 1854. I should judge that in 1852 this land was worth £50 an acre. It was well situated for a market garden. Its being crossed by the railway diminishes its value for building purposes a good deal.

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Cross-examined.—The railway has enhanced the value of property generally, but I think at the expense of that through which it passes. In 1854 the property in question was worth £60 or £70 an acre. In 1856 and 1857 it was worth much more. Part of the glebe was used as a brickyard, part of it lay in common.

The following Exhibits were also put in by consent of both parties :—

Letter from Plaintiff to C. J. Brydges, Managing Director of Defendants. Statement.

Rectory, Woodstock, 15th Jan'y, 1855.

SIR,

An eight months' sickness, and necessary absence from home, have prevented me from addressing you hitherto on a subject of some importance to myself.

From the formation of the Great Western Railroad Company, I have invariably replied to the applications made to me for a passage through the glebe of this rectory, that as I had only a life-interest in the property, I would ask for no pecuniary remuneration for the land to be appropriated, but that I expected the Company would give to the Rector of Woodstock (et uxor) a free ticket. I also made an offer of five acres free to the Company for a depot in Woodstock, in case no better site could be obtained. Moreover, the directors are aware that I rendered them some efficient service in securing their present depot.

The agents of the Company (I remember Mr. P. Carroll and Mr. Gunn) very properly said they had no authority to enter into such an engagement, but that they doubted not the reasonableness of the claim would ensure its allowance. Would you kindly submit my request to the directors?

1866. *Letter of C. J. Brydges to Plaintiff.*

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Hamilton, 19th January. 1855.

SIR,

I beg to acknowledge the receipt of your letter of the 15th instant, and have much pleasure in handing to you the enclosed free pass over this railway to the end of the present year.

Letter from Plaintiff to Mr. Brydges.

Rectory, Woodstock, 21st January, 1856.

SIR,

On applying the other day at your office for the renewal of my ticket or pass, you stated through your Secretary, that, as the circumstances under which it was granted had escaped your recollection, it would be necessary for me to renew my application to the Board of Directors.

I beg to enclose the application which I would respectfully request you to lay before the board.

Statement. *Letter from Plaintiff to Vice President and Directors of the Company.*

Woodstock, 31st January, 1856.

GENTLEMEN,

About a year ago I submitted to your board my application for a free ticket or pass on the following grounds:—

1. The free grant of the land in the town of Woodstock, belonging to the rectory, through which the road passes. I stated repeatedly to the agents of the Company, Messrs. *P. Carroll, Dunn* and others, that, as I have only a life interest in the property, I could not receive a pecuniary gratuity to the prejudice of my successors, and therefore I would give the land with the understanding, not the promise (the agents had no authority to make it), that I should have the privilege of a free passage on the road. The reasonableness of the request appeared to them sufficient security for its success.

2. The offer to the Company of other five acres gratuitously for a station, on the conditions as above stated, should no better site be presented.

3. The successful efforts made by me (including several interviews with the Board of Directors) to secure

to the Company the present advantageous site in this 1866.
town.

Upon these grounds the Company granted to myself (et uxor) a free ticket last year; the same reasons will, I doubt not, be valid to secure the renewal of the privilege this year.

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Letter from W. C. Stephens, Secretary of Company, to Plaintiff.

5th February, 1856.

REV'D SIR,

Your letter of the 31st ult., requesting a renewal of the free pass which had been granted to you for the past year, having been submitted to the Managing Committee, I am instructed to inform you that the directors regret that they do not feel that they would be warranted in continuing you that privilege, conceiving that the enhanced value of the remainder of your land fully compensated for the portion appropriated to the purposes of this railway.

Letter from Mr. Brydges, to Plaintiff.

Statement.

17th July, 1856.

DEAR SIR,

I brought your application for a free pass over this railway under the consideration of the Board of Directors at their meeting to-day, and also read the various documents with which you supplied me. I regret to have to inform you that the decision of the board was that they could not feel it expedient to alter the decision at which they had previously arrived upon this subject.

Extract from Minutes of the Board of Directors on 18th July, 1856.

Read a letter from the Rev'd Wm. Bettridge, of Woodstock, renewing his claim for a free pass over the road, on the ground formerly urged, of having given his land for the purposes of the railway, upon the express promise by Mr. Carroll, at that time a director of the Company, engaged in purchasing the right of way, and Mr. Gunn, the Company's land agent, that for so doing a permanent free pass should be given him. He enclosed a certificate from Messrs. Carroll and Gunn that such promise was made him, and also a certificate from

1866. the churchwardens of Woodstock, that it was upon that condition they consented to execute a conveyance of the glebe land.

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The board, conceiving that the agents referred to had exceeded their powers in making such a promise, did not feel called upon to fulfil it, and deemed it inexpedient to alter their former resolution.

Letter from Jarvis & Blake, Solicitors, to Mr. Brydges.

January 6th, 1857.

SIR,

We are instructed to take steps to compel the specific performance of the agreement for a free pass over the G. W. R. R., in consideration of which the Rector of Woodstock conveyed to the G. W. R. R. Co. a portion of lot 19 in the 1st concession of East Oxford.

Repeated applications having been made, but without effect, you will have the goodness to inform us without delay whether the Company is prepared to carry out its agreement, and if not, to instruct its Solicitor to accept service of process.

In expectation of your reply,
We are, &c.

Statement.

Extract from Minutes of the Managing Committee on the 13th January, 1857.

Read a letter from Messrs. Jarvis & Blake, of Toronto, Solicitors to the Rev'd W. Bettridge, Rector of Woodstock, of the 6th January, requiring the Company to furnish Mr. Bettridge with a free pass under the terms of his agreement with the Company. The committee ordered the issue of free passes to the Rev'd W. Bettridge and to the Rev'd B. Cronyn, the Rector of London.

Extract from Minutes of Board of Directors of Defendants on 30th January, 1857.

Read a letter from the Rev'd Dr. Cronyn, of the 25th January, referred to the board by the managing committee on the 27th instant, Minute No. 859, acknowledging the receipt of a pass for the current year, and requesting to be informed, as the question was not referred to in the Secretary's letter enclosing the pass, whether or not the directors admit his claim to a perma-

nent free pass, as he should decline to accept it if issued as a favor. Read also a letter of the 27th January, from Messrs. Jarvis & Blake, of Toronto, Solicitors to the Rev'd Dr. Cronyn and the Rev'd Mr. Bettridge, stating that they had been instructed by those gentlemen to inquire whether the board recognised their right to permanent free passes over the road, and intimating their intention, if the claim was not allowed, to appeal to the Court of Chancery to enforce it. Mr. Gwynne, Solicitor, having advised that the claim asserted by Dr. Cronyn could not be substantiated in court, the board ordered that Messrs. Jarvis & Blake be informed that the directors cannot recognise the legal claim of Dr. Cronyn and Mr. Bettridge to free passes over this railway, and therefore do not feel in a position to enter into an arrangement that would bind their successors. As, however, it may be considered that there is a moral obligation upon them to grant passes to Dr. Cronyn and Mr. Bettridge, instructions have been given for passes to be furnished them for the present year, leaving the question of future years to be dealt with by the board existing at the time, and that this is the only course the directors are in a position to adopt in the matter.

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Statement.

Letter from Plaintiff to Mr. Brydges.

London, 23rd October, 1860.

MY DEAR SIR,

In acknowledging the receipt of your letter of the 15th inst., (in answer to mine of the 29th August) I claim your indulgence for the brief expression of my opinions on your communication.

A moment's reflection must, I conceive, remove from your mind every idea of parallelism between my claim and that of the Bishop of Huron. He received a pecuniary consideration for his grant: I received none. Your agent-director (Mr. Gunn), although he could not, as he said on examination, dispute the bishop's word, that the promise of a free pass had been given to him, still that he, Mr. Gunn, had no recollection of the fact. In my case, on the contrary, both Mr. Gunn and Peter Carroll, your agent-directors in the transaction, have certified in writing, and are ready to confirm their statement on oath, that they did each of them frequently (as authorized agents of the Company) promise in the name, and pledge themselves on behalf of the Company,

1866. that as Rector of Woodstock, in consideration of my granting a free and gratuitous passage of the railroad through my glebe, I should always be entitled to a free pass. The churchwarden, Mr. *William Gray*, who was present when I signed the deed of transfer, is ready on oath to declare, that before signing I received the promise and pledge from the agent-directors, and also from the legal agent of the Company, that I should be entitled to and receive a free pass.

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Sickness and a consequent absence of four years on the continent of Europe, have prevented me from prosecuting my claim in a court of equity. I shall now very reluctantly yield to what I consider only as a matter of duty.

I have submitted the case to many legal gentlemen, and only one opinion have I received :—the expression of surprise that your Company should hesitate a moment to fulfil so plain and positive a contract.

Statement.

Let me indulge the hope that the Board of Directors will reconsider their decision, and acknowledge my claim as reasonable, just and equitable.

An answer at your early convenience will oblige, my dear Sir,

Yours very faithfully.

The following judgment was pronounced by

SPRAGGE, V. C.—After the formation of the defendants' Company, and preparatory to the construction of the road, Mr. *Peter Carroll*, one of the directors, was employed by the Company as their agent for acquiring land along the road ; and Mr. *Gunn* was the arbitrator of the Company. These two gentlemen dealt with proprietors of land required by the Company, in order to acquire it by private arrangement, and obtained a good deal of land for the Company in that way.

In regard to the land obtained from the plaintiff as Rector of Woodstock, my conclusion, from the whole of the evidence, is, that it was obtained under the following circumstances :—

Mr. *Carroll* and Mr. *Gunn* saw the plaintiff upon the subject of certain land belonging to the rectory, through which the railway was to run. The plaintiff very properly stated to them in effect, that having, as rector, only a life interest in the land, he could not properly give the land, or sell it and receive for it a pecuniary consideration, which would be of benefit only to himself personally; but he proposed as a consideration, which would benefit his successor as well as himself, that free passes to travel on the line of the road should be granted to himself and his successors in the living. Messrs. *Carroll* and *Gunn* thought this reasonable, but said they had not authority to make such a provision so as to bind the directors, but that they would agree to it subject to the approval of the board, and Mr. *Carroll* as agent was to submit it to the board. The date of this arrangement is not given, but I understand it to have been before April, 1851, when Mr. *Carroll* went to England.

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The letters written by the plaintiff, applying to the directors for free passes on the road, the one dated in January, 1855, the other in January, 1856, have caused me to hesitate and to entertain some doubt whether the arrangement went so far as I have stated it. The plaintiff in the first letter says that the agents of the Company very properly said they had no authority to enter into an engagement, but that they doubted not the reasonableness of the claim would insure its allowance. In the second letter he assumes to restate the case, and says that he had stated to the agents of the Company that as he had only a life-interest, he could not receive a pecuniary gratuity to the prejudice of his successors, and therefore he would give the land with the understanding, not the promise, (the agents not having authority to make it) that he should have the privilege of a free pass on the road. In both letters the plaintiff sets forth services which he had rendered to the Company, and puts what he asks, not so much as a matter of right, as a claim upon the justice and consideration of

Judgment

1866. the board. By deed poll, dated 26th July, 1852, the plaintiff, as rector, and the churchwardens of St. Paul's church, Woodstock, conveyed the land required by the defendants, consisting of one acre and one-tenth of an acre of land, to the Company, for the expressed consideration of 5s. At the arrangement between the plaintiff and the agents respecting the land, there was also present a Mr. *Gray*, who attended officially as churchwarden. Mr. *Carroll*, Mr. *Gunn* and Mr. *Gray* are all examined as witnesses; the two former, upon the plaintiff's letters being read to them by the defendants, say they think they give a correct account of what passed: they both say, however, that the agreement as I have stated it (they call it an arrangement) was made between them and the plaintiff, though subject to the approval of the board, and that they promised to submit it to the board. Mr. *Gray* agrees as to what was proposed, and says that both Mr. *Carroll* and Mr. *Gunn* seemed satisfied; he thought they had authority to make the arrangement.

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Judgment.

There is a further piece of evidence upon this point. The directors having granted the plaintiff's application of January, 1855, and refused his application of January, 1856; certificates from *Carroll*, *Gunn* and *Gray* were sent into them; and the plaintiff made his claim as upon an express promise by the Company's agents; and the minute of the board, dated 18th July, 1856, is in these words: "The board, considering that the agents referred to had exceeded their powers in making such a promise, did not feel called upon to fulfil it, and deemed it inexpedient to alter their former resolution."

Bearing in mind, while looking at the plaintiff's letters, that all that he had was a verbal provisional agreement, subject to the approval of the board, an approval of which he had no evidence, and that he had executed a conveyance without any provision being carried out, he might be content to put his case as he did. His admis-

sion that there was no promise, I think must mean no promise assuming to bind the Company, the agents disclaiming authority to do so; but he puts it that there was an understanding, a claim, or proposition, which the agents thought so reasonable that they did not doubt it would be acceded to. He may have feared to press the matter too strongly as a matter of right, and have been content to put it upon the footing that he did. There was perhaps another reason which induced the plaintiff to put his claim as he did. I find the words "*et uxor*" in the letters; as a matter of right, he could only claim for himself. The only use the defendants can make of these letters, is as evidence against the fact of there being such a provisional agreement as is alleged. I think, looking at all the evidence to which I have referred, that it is a conclusion that such provisional agreement was made by *Carroll* and *Gunn*.

1866.
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Mr. *Proudfoot* contends that the arrangement was at most an honorary one. If it were so, I agree with him that this Court could not decree its execution; but I think it was not of that character. It was no doubt optional with the Company to accept it or not; but the test is, if they did accept it, would it still be optional whether they would carry it out or not. Suppose it put in writing as a proposition, and submitted by *Carroll* to the board, and its adoption appeared upon the minutes, it would surely be binding. There is nothing to show that the plaintiff intended, when dealing with the Company's agents, that the consideration for the land he was parting with was to rest in the generosity of a body of directors, varying from year to year. He put what he proposed as the shape in which he conceived it would be proper that he should be compensated; and that at all events was distinctly understood. His end would not be answered unless he obtained a benefit which would accrue not only to himself but to his successors in the rectory. What passed at the execution of the deed, is confirmatory of this. It was taken to the plaintiff and

Judgment.

1866. the churchwardens by a clerk of the solicitors, as I understand, who had prepared it on behalf of the Company. At its execution the plaintiff stated to this gentleman that the consideration for the deed was that he and his successors were to have free passes on the road; and Mr. *Gray*, the churchwarden, who deposes to this, adds that he is convinced that neither the plaintiff nor himself would have executed the deed but for that consideration.

Bethbridge
v.
Great West'n
Railway Co.

Judgment.

Assuming the plaintiff to have proved the arrangement with the defendants' agent, as I have stated it, it is still necessary for him to prove that the Company assented to or acted upon it. I desire to observe that I do not think proof of any promise or agreement by *Carroll* or *Gunn* essential to the plaintiff's case. I will put it in a way which I think the evidence supports beyond all question, viz., that he proposed, instead of a money consideration for the land, the granting of passes to himself and future rectors; that the agents said they thought it a reasonable proposition, and agreed to submit it for the approval of the board. If submitted, and accepted or acted upon, it would be binding.

I think I must take it to have been submitted to the board. *Carroll* says it was his practice to submit all arrangements to the board, some of which were confirmed and some not. It is certain that he reported to the board that the plaintiff had agreed to part with this land upon some terms; and I think I must assume that he reported the terms truly. If upon his report they procured a conveyance of the land to themselves, it was an adoption of the terms proposed as the consideration. It could not be otherwise. They could only take the benefit *cum onere*; and, moreover, they nowhere say that the plaintiff's proposition was not submitted to them; and in their minutes of July, 1856, they assume rather than deny that not only was a proposition made by the plaintiff, but that it was acceded to by their agents,

though, as they say, without authority; and therefore they determine to repudiate the arrangement, so far as it imposed a duty upon the Company; a most illogical as well as a most unjust conclusion from the premises.

1886.
Bettridge
v.
Great West'n
Railway Co.

It is not denied, I believe, that if the plaintiff has succeeded in establishing his case upon the facts, proving a consideration beyond the one expressed in the conveyance, he is entitled to the benefit of the additional consideration proved; unless for other reasons he is disentitled to it. *Clifford v. Turrell*, (a) is an authority on that point.

But it is contended that for other reasons he is disentitled. The contract is objected to as unreasonable. This is not a bill for specific performance, and I do not see how the objection can lie, on the part of those who are enjoying their side of the bargain and do not offer to give it up. Besides there is no evidence that it is unreasonable. Then it is objected to as uncertain, as the class of carriages, and to what part of the road the privilege was to extend, is not specified. As to the class of carriages, there would be no difficulty in what class a Rector of Woodstock would reasonably expect to travel; and I suppose as the grantors of the right have not specified any class, the grantee, as a matter of law, would have a right to choose. As to the extent of road, the grantors have not limited it, and I suppose the privilege must be co-extensive with the road; nor are the times limited, nor I suppose would be, unless the Rector should make an unreasonable use of the privilege, such as it would be apparent was not contemplated by the parties to the contract. I use the words grantor and grantee, not as strictly correct, but as denoting the position of the parties with sufficient accuracy.

Judgment.

It is also objected that the plaintiff has been guilty of

(a) 1 Y. & C. C. C. 138.

1866. laches. The delay is probably sufficiently accounted for, but I think this is a case in which delay is not an objection, at least such delay as has occurred in this case, for the defendants have already all that they were to have. In suits for specific performance by a purchaser, where the vendor has been paid the whole of his purchase money, delay has been held to be no objection.

*Bethridge
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I think the plaintiff entitled to a decree, and with costs. The decree may declare that the privilege of passing over the defendants' road by the plaintiff and his successors, Rectors of Woodstock, was a part of the consideration for the conveyance of the land to the Company, and that he and they are entitled to the benefit of it; and the plaintiff is entitled to an account, if he desire it, of moneys exacted from him by the Company as a passenger in their cars. All parties to have liberty to apply, including future Rectors of Woodstock.

Judgment.

By the decree dated March, 1864, the court declared that the agreement ought to be specifically performed, and ordered and decreed the same accordingly. And it was ordered that the defendants should suffer and permit the plaintiff, as Rector of Woodstock, so long as he should be such Rector, and his successors in the rectory, from time to time and as often as he and they may require, to travel over the railway of the defendants, between any and all stations thereon, in any first class cars attached to the passenger trains run over the railway, and should for that purpose from time to time, as and when occasion might require, issue to the plaintiff as such Rector, and to his successors in the rectory, free first class passenger tickets over the railway.

And it was ordered that the defendants should pay to the plaintiff his costs of the suit.

And the court reserved liberty to the plaintiff, and to the Rector of Woodstock for the time being, and to the defendants, to apply to the court from time to time, as and when occasion required. 1866.

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The cause was reheard before the full court on the petition of the Company on the 2nd December, 1864.

The court at the close of the argument pronounced judgment, and at the instance of the plaintiff, ordered that the decree should be varied by striking out the words following, that is to say, "and do for that purpose from time to time, as and when occasion may require, issue to the plaintiff, as such Rector, and to his successors in the said rectory, free first class passenger tickets over the said railway." And it was ordered that the decree should be affirmed with that variation, and that the deposit paid by the defendants on the rehearing should be paid to the plaintiff in full of his costs of the rehearing.

Statement.

From these decrees the Company appealed to this court.

Mr. Strong, Q. C., and Mr. Proudfoot, for appellants, cited *Cogent v. Gibson* (a), *Pickering v. Ely* (b), *Johnson v. The Shrewsbury and Birmingham Railway Co.* (c), *Sturge v. The Midland Railway Co.* (d), *Stanley v. Robinson* (e).

Mr. Blake, Q. C., *contra*, referred to *Storer v. Great Western Railway Company* (f), *Winter v. Anson* (g).

ADAM WILSON, J.—The right claimed in the bill is,

(a) 33 Beav. 557.

(e) 3 DeG. M. & G. 927.

(e) 1 R. & My. 527.

(b) 2 Y. & C. C. C. 249.

(d) 4 Jurist N. S. 273.

(f) 1 Y. & C. C. C. 180.

(g) 3 Russ. 488.

1866. "to travel over the railway of the defendants, in the passenger trains of the defendants, free of all charges, and to have a first class free ticket for that purpose," as the consideration for having conveyed to the defendants for their railway track, about an acre and a fifth of the glebe land of the rectory of Woodstock, of which the plaintiff was and is the incumbent. This conveyance was made on the 26th of July, 1852, and the bargain is said to have been made with the defendants through their agents, Messrs. *Carroll* and *Gunn*, verbally.

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On the 17th of July, 1856, Mr. *Carroll* gave the plaintiff a letter addressed to the defendants, stating that it had been finally agreed with the plaintiff when this right of way was procured from him, "that the company should have the right of way on consideration that they gave him the Rector a free ticket over the road."

Judgment.

Mr. *Carroll* states, "I do not conceive that we had authority of ourselves to make such arrangement; and the plaintiff understood the arrangement was subject to the approval of the board."

The plaintiff in his letter of the 15th of January, 1855, to the defendants, says: "as I had only a life interest in the property, (I have always said) I would ask for no pecuniary remuneration for the land; but that I expected the company would give to the Rector of Woodstock (*et uxor*) a free ticket. The agents of the company, Messrs. *Carroll* and *Gunn*, very properly said "they had no authority to enter into such an engagement, but that they doubted not the reasonableness of the claim would ensure its allowance."

And in his letter of the 31st of January, 1856, he states that he had mentioned repeatedly, "I could not receive a pecuniary gratuity to the prejudice of my successors, and therefore I would give the land with the

understanding, not the promise (the agents had no authority to make it,) that I should have the privilege of a free passage on the road; the reasonableness of the request appeared to them sufficient security for its success. Upon these grounds they granted to myself (*et uxor*) a free ticket last year; the same reasons will, I doubt not, be valid to secure the renewal of the privilege this year."

1856.
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The company, in 1855, gave the plaintiff a free pass to the end of the year. In 1856 the company refused to grant it. In 1857 the company were willing to grant it for that year, "leaving the question of future years to be dealt with by the board existing at that time;" but whether it was granted or not I cannot make out; it is perhaps of no great consequence, for the defendants have never acknowledged the plaintiff's right as he claims it; and they have since refused to grant him a free pass as he prays by his bill.

Judgment.

Upon a consideration of the facts, I think no such contract has been made out as the plaintiff has stated; nor do I think that the conveyance was clogged with any such condition; but that the most which the plaintiff depended upon was the *expectation* mentioned in his letter of the 15th of January, 1855, and the *privilege* mentioned in his letter of the 31st of January, 1856, for a free pass for himself and wife; and that not altogether because he had asked nothing for the land, but because he had shewn his good will to the defendants by offering them five acres free for a depot in Woodstock, if no better site could be procured; and because he had, as he says, rendered the company "efficient service in securing their present depot;" which are specially alluded to in the letters first referred to when asking for the grant of a ticket.

In *Meynell v. Surtees* (a), it was held that the

(a) 1 Jur. N. S. 80, 737.

1866. *Bettridge v. Great West'n Railway Co.* plaintiffs, the directors of a railway company, who had taken possession of land and constructed their railway upon it, at great expense, and with the knowledge of the land owners, who made no objection thereto—under an offer made to receive as compensation triple damages yearly, and to grant a way-leave for sixty years—were not entitled to it, and that they could not treat the offer with the acts which were afterwards done as amounting to a contract.

That case had many important circumstances which made it much more reasonable to have been decreed to be specifically performed than the case of the plaintiff *Mr. Bettridge*.

Judgment. The acceptance by the defendants of *Mr. Bettridge's* conveyance was not an acceptance of it subject to the claim now advanced; it does not appear that such a claim was stated to the company as the condition only on which they should get the land; it does not clearly appear when the claim was first made known to the company, nor that they had it in contemplation at all when the deed was made; they were entitled to take the land without the plaintiff's consent, and the acceptance of the deed is not therefore necessarily an acceptance of it, subject to the supposed condition. The plaintiff could still compel the defendants to make compensation to him for his land, if the condition did not attach; and it did not in my opinion attach; for among other reasons, no such condition as is set up has been proved; and I prefer to rely upon the plaintiff's own interpretation of what his rights were at the time he wrote the letter before referred to, than upon any of the other testimony in the cause; for it is scarcely possible to believe that he has stated his pretensions to be any lower than he conceived them to be in fact; they were then, no doubt, in his opinion, the utmost measure of his rights.

I am not satisfied a bargain could be made by the company to grant a free pass, or ticket, or passage, in perpetuity. I do not say it could not under some very peculiar circumstances, but I entertain very serious doubts of the legality of such a bargain, which are not at all lessened by the franchise being attached to and made descendible with the parsonage.

1866.
 Bottridge
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But if it could be, it does not appear to me that it is a bargain of the kind, which would be decreed to be specifically performed.

The land is stated to have been valued at £55, the yearly interest of this sum is £3 6s., which is all that the plaintiff is entitled to by the statute; and for this very insignificant sum he claims for himself (*et uxor*) and his successors, a free pass, or a free passage over this railway of some hundreds of miles in extent, for ever; the yearly sum of £3 6s. being less than the price of a single trip and return along the road, which can be performed in one day.

Judgment.

There are many other reasons why I conceive it would not be expedient to execute it. 1stly. Because the bargain in its simple form is for a grant of the land to be held upon condition, which, in this instance, would not operate harshly on the defendants, because if they wish to give up the land they can do so, and at the same time discharge themselves from the condition; while if the bargain is enforced upon any other terms the defendants would still be bound to go on carrying the plaintiff and his wife, and his successors, for ever, although the land had been given up and their line of railway moved to a distance of twenty miles off.

2ndly. Because the statutable method of giving compensation affords not only the fullest, but the most proper, as well as the most satisfactory redress in every respect.

1886. 3rdly. Because this bargain would not, I conceive, be binding on the successor, who might claim the proper pecuniary compensation provided for by law: and 4thly. Because the franchise cannot be conveniently exercised, and must necessarily give rise to many differences and difficulties which suggest themselves readily to the mind in attempting to exercise it; and which, although applicable in some measure to season tickets, which are not unfrequently granted, nevertheless apply with far greater force to a ticket or passage to be decreed now for all time to come.

*Batbridge
v.
Great West'n
Railway Co.*

Upon the whole, I think that no such contract as is alleged by the plaintiff has been proved, and that his case utterly fails; but if it were proved that it should not, and cannot for the reasons stated, be enforced against the defendants; the plaintiff has still his remedy as any ordinary land owner has for compensation; and the compensation he will get by the statute will be the proper equivalent both for himself and his successors for the land which has been taken.

Judgment.

I have stated my own individual reasons for the conclusion at which I have arrived, which is that the appeal should be allowed, and the bill in the court below be dismissed with costs.

DRAPER, C. J.—Concurred in reversing the decree of the court below, on two grounds: 1st. That the Rector of Woodstock was bound to obtain from the railway company the purchase money for such lands as the company might require for the use of their railway, for his own use and that of his successors, *qua* Rectors, and to invest the same accordingly. 2nd. That the company could not deal with the Rector except under the powers given by their charter, and that it was incumbent on them to purchase and to pay, instead of entering into such an agreement as the bill sets out, which might be injurious to their shareholders, and for

which the acts of the legislature give no sanction. He 1866.
 thought, however, that under all the circumstances of
 the case the bill in the court below should be dismissed
 without costs.

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RICHARDS, C. J., concurred in reversing the decree, but thought the case should follow the usual course, and that the bill should be dismissed with costs.

HAGARTY, J., concurred in the views expressed by the Chief Justice of Upper Canada.

MORRISON, J., and J. WILSON, J., concurred in the judgment delivered by Mr. Justice A. Wilson.

MOWAT, V. C.—The objections made by the defendants on the re-hearing of this cause in the court below, were the same as had been made before my brother *Spragge* at the original hearing. His lordship the Chancellor and myself, on the re-hearing, entirely concurred in the view taken of those objections in the judgment given by my brother *Spragge* on the hearing before him; and the renewed discussion which the case has undergone here has failed to create in my mind any doubt whatever of the accuracy of that view. Some other objections were made here for the first time. I have considered those also, as some of the members of this court appear to think them still open to the defendants; and the conclusion to which I have come is that they afford no defence to the plaintiff's right to relief, any more than those other grounds taken by the answer, and relied on in the argument in the court below.

Judgment.

I shall consider, first, the objections urged before us in Chancery, and then, the further objections which were not taken until the case was argued here in appeal.

1. Was there any such agreement as the bill sets up?

1866. On this point I do not see how, upon the evidence, it is possible for us to feel any doubt. A distinct and well understood agreement between the company's agents and the plaintiff, to the effect alleged, subject to the approval of the company's directors, is expressly and positively sworn to by the agents themselves (one of whom, Mr. *Carroll*, was a director of the company), and by another witness. No attempt is made to discredit these witnesses, or to contradict their testimony in the smallest particular. It is not pretended, or suggested, that any new or different agreement was afterwards made between the plaintiff and the company; either this was the agreement or there was none. Then Mr. *Carroll*, who had been acting as agent of the company for several years before the transaction in question, swears, that he has no doubt he reported to the board by letter the arrangement which he and his co-agent had made with the plaintiff; that this was the rule he followed in regard to all the arrangements he negotiated for the company with land owners; that it was the practice of the company to carry out through their solicitor the arrangements of which they approved; that of these the agent heard nothing more; that when his arrangements were disapproved of, he was usually instructed to notify the parties of such disapproval; that he was not informed of the arrangement he had made with the plaintiff having been disapproved of; and that he knew of no instance in which the board made arrangements with parties with whom he had been negotiating. These statements are not met by any counter evidence whatever. Shortly afterwards a deed of the land was presented to the plaintiff by the company for execution, and he executed it, after mentioning to the gentleman who presented it on behalf of the solicitor, the consideration on the faith of which the plaintiff was giving the land. Under this deed the company has ever since held the land.

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Judgment.

Is it possible, upon these facts, for the company

to dispute the conditional contract which the agents made? Can they be permitted to say that the contract never had their approval or assent? Can they act upon a contract for four years or more, and be allowed then to retain the conveyance and repudiate the price agreed to be paid for it? Is not evidence of consent, coming far short of this, acted upon every day as conclusive? I go to a shop and ask the price of a piece of goods; on learning the price, I order the article to be sent to my house. Can I four years, or four months, afterwards, refuse to pay the price named, and say that I never agreed to it, because I did not expressly say that I agreed to it? Is not my taking away the article ample evidence of my consent to pay the price named? Or, I send my servant; he agrees, subject to my approval, to take the goods at a certain price specified by the seller; this is reported to me; I send for the goods; receive them; and use them. Do I not thereby, beyond all question or doubt, assent to pay the price conditionally agreed to by my servant? Is there not a bargain as to the price which I cannot afterwards repudiate?

1866.
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Railway Co.

Judgment.

The learned counsel for the defendants endeavored to found an argument against the plaintiff on his letters to the company in 1856 and 1857. But I see nothing in these letters to weaken the plaintiff's case. He presses on the company other considerations for giving him the free ticket, in addition to those which sustain his legal claim; and, in view of them all, the company recognized a moral, when they denied a legal, obligation to accede to the plaintiff's application. But I do not see how a clergyman's urging considerations which created, what in his view was a higher, namely, a moral obligation, can possibly detract in a court of equity from the value of those considerations which were sufficient to establish the legal obligation on the part of the company.

I think, therefore, that the agreement has been established as clearly and satisfactorily as a verbal

1866. agreement could possibly be, and far more clearly than in many cases, both at law and in equity, in which such agreements have been enforced.

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v.
Great West'n
Railway Co.

Judgment.

Meynell v. Surtees (a) is relied on in the judgment of my brother *Wilson*, on this point. The case before the Vice-Chancellor is more fully reported in 3 *Smale and Gifford*, 101, than in the report in the *Jurist* to which my brother referred. The decision there against the right to specific performance was on the ground, as correctly stated in the marginal note (b), "that there had been a variation as to the parties and the subject matter of the contract;" and not on the ground that the company's acts would not otherwise have been sufficient evidence of acceptance on their part of the defendant's offer. Three sentences from the judgment of the Vice-Chancellor are sufficient to shew this. "The plaintiffs claim by a title derived from the *Derwent Iron Company*. If that company, to whom the offer was made, had in writing, or by unequivocal and binding acts, accepted the offer, it might have amounted to a contract, and would have been assignable. But the assignment of an unaccepted offer made to one individual with specific views, and for a specific purpose, could not easily enable the assignee to give an acceptance which should turn the offer into an agreement as against the person who made it." Similar language was employed by the Lord Chancellor in affirming the Vice-Chancellor's decision (c). It has been expressly held in several other cases of the highest authority, where an agent had gone beyond his powers in entering into a contract, that proof of the company's having afterwards acted upon it was sufficient evidence of the company's assent and ratification, to entitle either party to specific performance. See *The London and Birmingham Railway Co. v. Winter* (d), *Wilson v. West Hartlepool Harbour*

(a) 1 *Jur. N. S.* 80.

(c) 1 *Jurist, N. S.* 737.

(b) 3 *Sm. & Giff.* 101.

(d) *Cr. & Ph.* 57.

and Railway Co. (a), and Hill v. South Staffordshire Railway Co. (b). 1866.

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It is said that the company had compulsory powers for taking this land; but I find no authority, and perceive no principle, that would justify us in holding on that ground, that the contract is less binding on the company than if there was no compulsory power, or that their acts of assent and ratification are less significant.

2. It was argued by the learned counsel for the company, that, assuming the contract to be proved, still the plaintiff was not entitled to a decree, because a free passage in perpetuity was an excessive price for the land.

One answer to this argument is, that there is no evidence whatever that the price was excessive. The onus of establishing it to be excessive was on the defendants, who allege such to be its character; and all the evidence is the other way. The agents of the company who made the bargain swear, that at the time they thought the consideration demanded reasonable; and they do not say they have changed their opinion since. That must have been the opinion of the board of directors at the same time; and not a single witness expresses a contrary view now. How can we in this state of the evidence judicially pronounce the consideration to be unreasonable or excessive? To do so would not only be without evidence, but would be against evidence. The land appears to have been worth about £55; and I have not the slightest reason for supposing that the railway fares of a Rector of Woodstock, annually, would have exceeded, or would have amounted to, the interest on that sum, had the bargain not been made. He may travel somewhat oftener if he

(a) 10 Jur. N. S. 1064; 11 Jur. N. S. 124.

(b) 11 Jur. N. S. 192.

1866. travels free, but the difference would not, for railway purposes, be very appreciable.

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But had the case established what the defendants allege as the fact, it would have been wholly immaterial. Equity has, rightly or wrongly, followed the law in holding that, in the absence of fraud, or other special grounds of exception not applicable to the present case, the adequacy, or inadequacy of the consideration is immaterial, as affecting the validity or construction of a contract, though the contract were wholly unexecuted, and not (as here) completely executed on one side. I apprehend that a learned writer states correctly the rule at law, and the reasons for it, when he says that "it is not essential in point of law that the consideration for a simple contract or promise should be adequate in point of value. If there be any consideration the court will not weigh the extent of it. It has no means of ascertaining the varied hidden motives and reasons that may have influenced the parties, and induced them to enter into the contract, nor can it determine upon the prudence or propriety of the transaction. If parties choose to enter into unwise or imprudent bargains, they must abide by the consequences of their own rashness and folly; they have contracted for themselves and the court cannot contract for them" (a). The principle thus is, that he who makes a contract must keep it; and courts of law, as I understand, enforce this principle to the full extent that their machinery enables them to do.

Judgment.

Such, also, is the practice of courts of equity wherever, for want of the necessary machinery at law, resort is had to equity (b). Thus, in *Borell v. Dawn* (c), where the sale was by assignees in bankruptcy for an inadequate con-

(a) Vide Addison on Contracts, 17, 567, 5th ed.; 1 Smith's Lead. Ca., 139, 5th ed.

(b) See Dart. on Vendors, 490, 5th ed.

(c) 2 Hare, 450.

sideration, Sir *James Wigram* stated the general rule I have referred to in the following terms: "With respect to the adequacy of the consideration alone, considered apart from the alleged improvidence in the manner of selling, I certainly understand the rule of the court to be, that, even in ordinary cases, and a *fortiori* in the case of sales by public auction, mere inadequacy of consideration is not a ground even for refusing a decree for specific performance of an unexecuted contract, and still less can it be a ground for rescinding an executed contract. The only exception which I believe can be stated is, where the inadequacy of the consideration is so gross as of itself to prove fraud or imposition on the part of the purchaser. Fraud in the purchaser is of the essence of the objection to the contract in such a case." I need not say that fraud on the part of the plaintiff is not pretended in the present case. The defendants knew the nature of his title quite as well when they accepted the conveyance as they do now.

1866.

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Judgment.

In *Cockell v. Taylor* (a) the Master of the Rolls stated the rule in question very distinctly. He said: "It is not my intention to lay it down that any inadequacy of price unaccompanied by other circumstances will avoid a contract, unless, perhaps, it be similar to that referred to by Lord *Hardwicke* as having occurred in the case of *Jones v. Smith*, where a man, supposing that he was buying a horse for a few barley corns, had in reality contracted to give 500 quarters of barley for a horse worth £8. It is in fact evidence of fraud, but, standing alone, by no means conclusive evidence, and if a purchaser with his eyes open, without concealment or deception on the part of the seller, choose to give ten times the value of a property, it is far from my intention to say anything that can lead to the supposition that this transaction can be impugned."

The case of *Clifford v. Turrell* (b) resembles the

(a) 15 Beav. 115.

(b) 1 Y & C. C.C. 188.

1866. present in several respects. The contract which the
 Bettridge plaintiff sought to enforce was a verbal one; and the
 Great West'n deed executed in consideration of that contract mentioned
 Railway Co. a nominal consideration only. Specific performance
 was decreed, though, in referring to the lease, of which
 the deed executed by the plaintiff was an assignment,
 the Vice-Chancellor (now Lord Justice) *Knight Bruce*
 said: "It is agreed on all hands, at least it is clearly
 proved, that the lease was worth nothing. * * I think
 the evidence receivable, notwithstanding the words of
 the deed, to shew that the plaintiff had objected to
 execute the assignment, until a collateral promise had
 been made to him, to allow him an annuity of £40 a
 year, and a house worth £10 a year. I think the
 promise was binding though the lease was worthless,
 and that the worthlessness of it did not make it less an
 object to the surety to obtain an assignment of it. I
 conceive, therefore, that the plaintiff is entitled to the
 benefit of the agreement." There, the plaintiff's interest
 in the land he conveyed was worth nothing; here, it is
 confessedly worth £55 at all events. There, what the
 plaintiff sought as a consideration for his conveyance
 was an annuity and a house, worth together £50 a year;
 here, there is no suggestion that the free pass is worth
 anything like that sum. How can we, in the face
 of that case, hold that this contract cannot be enforced
 on any notion of the price being excessive? There,
 too, the evidence of the verbal bargain was contradictory,
 though the learned judge was satisfied on the whole
 that the fact was as the plaintiff alleged. Here, there
 is no contradictory evidence whatever.

Judgment.

Foreign courts take the same view of the objection I
 am considering, as English courts do. Thus, Mr.
 Justice *Story* makes this statement of the doctrine (a):
 "Mere inadequacy of price, or any other inequality
 in the bargain, is not to be understood as constituting

(a) Eq. Jur., sec. 244, 245.

per se a ground to avoid a bargain in equity. For 1866.
 courts of equity, as well as courts of law, act upon the
 ground that every person who is not from his peculiar
 condition or circumstances under disability, is entitled
 to dispose of his property in such manner and upon
 such terms as he chooses; and whether his bargains are
 wise and discreet, or profitable or unprofitable, or other-
 wise, are considerations, not for courts of justice, but
 for the party himself to deliberate upon. Inadequacy
 of consideration then, is not of itself a distinct principle
 of relief in equity. The common law knows no such prin-
 ciple. The value of a thing is what it will produce; and it
 admits of no precise standard. It must be in its nature
 fluctuating, and will depend upon ten thousand different
 circumstances. One man, in the disposal of his property,
 may sell it for less than another would. He may sell
 it under a pressure of circumstances, which may induce
 him to part with it at a particular time. If courts of
 equity were to unravel all those transactions they would
 throw everything into confusion, and set afloat the con-
 tracts of mankind. Such a consequence would of itself
 be sufficient to shew the inconvenience and impractica-
 bility, if not the injustice, of adopting the doctrine that
 mere inadequacy of consideration should form a distinct
 ground of relief." Judgment.

In the civil law the rule is the same, with perhaps a
 single variation which has not been adopted in England
 or America.

It was suggested on the argument, that, even if the
 directors sanctioned this contract, it would be unjust to
 enforce it against the shareholders. I do not see the
 injustice; and the right to separate the directors in this
 way from the shareholders has long ago been repudiated.
 In *Edwards v. Grand Junction Railway Company* (a)
 the question was as to the validity of a contract entered

(a) 1 Railway Ca. 199.

1866. into on behalf of the company, and Lord *Cottenham* thus referred to the objection I am now considering: "It was contended for the railway company that to enforce this would be injustice to the shareholders of the company, who had no notice of such an arrangement; to which two obvious answers can be given:—First, that the court cannot recognise the rights of individuals interested in the corporation, but must look to the rights and liabilities of the corporation itself." The second reason is not material here. The first reason Lord *St. Leonards* quotes and adopts in *Hawkes v. The Eastern Counties Railway Company* (a).

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3. It was further contended that the agreement is uncertain in its terms or effect, and is therefore incapable of being specifically enforced.

Judgment. My brother *Spragge* dealt with this objection, in his judgment on the hearing of the cause, in the aspects in which the objection was presented at the bar in the court below. Some other points of uncertainty were suggested here, and I shall confine my observations to these.

It was argued that the contract was uncertain because, amongst other things, there was no specification of the points at which the Rector may demand to enter or leave the railway cars. But can there be any reasonable doubt of the meaning of the parties to such a contract? Can anybody seriously question that their intention was that the Rector was to come on board wherever other passengers do, and might leave wherever other passengers leave? Who could suppose that a free pass would render it necessary for a railway company to make their arrangements, or run their trains, for the accommodation of the single passenger who held the pass? Does the contract in substance and effect do anything more than relieve the Rector from the obligation of paying the ordinary

fares, payment of which would entitle him to travel as a matter of right without any contract on the subject? 1866.

Does the contract in its substance and effect alter the position of either party in regard to the use of the railway, and the carrying of the plaintiff thereon, except as to the payment of the ordinary fares otherwise payable, in availing himself of the ordinary privileges which any other individual is entitled to demand? Does not the whole difference between the parties relate to the small annual sum of money which but for the contract the railway company would obtain from the Rector for the time being? Such seems to me to be the case.

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The interpretation of this contract, as of all contracts, must be reasonable, and, reading it in this way, it does not appear to me to be wanting in any details essential for a due understanding of the intention of the parties. It is not necessary that a contract to entitle either party to a specific performance of it, should provide for every detail, or every possible contingency either. Where a contract is framed in general terms, the law will, as far as possible, supply details; and terms not expressed may be supplied by reasonable presumption (a). As Lord *St. Leonards* said of the case in *Ridgway v. Wharton* (b), "The main binding terms are provided for: no objection can ever arise because there are collateral circumstances which necessarily flow out of such agreement, and which are not mentioned. If there was anything peculiar, it would be incident to the agreement, and it would be supplied by the court, as in every contract." "Where," as Lord Justice *Turner* explained in *Wilson v. West Hartlepool Railway and Harbour Company* (c), "Where possession has been given upon the faith of an agreement, it is, I think, the duty of the court, as far as it is possible to do so, to ascertain the terms of the agreement, and to give effect to it."

Judgment.

(a) See Fry on Sp. Perf. s. 221 et. seq. and s. 229 et. seq.

(b) 6 H. L. 285.

(c) 11 Jur. N.S. 124.

1866. It is said, also, that the evidence establishes a contract for a free ticket, while the decree on rehearing merely decreed to the plaintiff a free passage—a free ticket and a free passage, it is said, being two different things. I apprehend that a contract for a free ticket is a contract for a free passage, just as a free deed (a common expression here) is a contract for the land which the deed is to be the instrument of conveying. The direction in the original decree for giving to the plaintiff free tickets was struck out on the rehearing, because, from applications which had come before the Chancellor in the meantime, the court learned that the company threw difficulties in the plaintiff's way by means of that provision. But whether the plaintiff should carry a ticket or not, when he travelled on the railway, and whether such a ticket should be a season ticket, to be renewed every year, or how otherwise, are matters of detail, and such as, according to all the authorities, do not constitute any ground for refusing specific performance of the bargain.

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Judgment.

So, also, as to the questions that may, in possible contingencies, arise between the parties—these must all be considered and disposed of when they arise, if they ever do arise. That ingenuity may suggest such questions, and that there may be greater or less difficulty in answering one or more of them, need not be disputed. It is so with all contracts; and nothing can be more clear than that on no such ground can specific performance be refused consistently with the settled doctrines of equity courts.

The argument of uncertainty, in the present case, if the slightest foundation for it is thought to exist, has certainly incomparably less to go upon than there was in the case of *The Great Northern Railway Company v. The Manchester, Sheffield, and Lincolnshire Railway Company (a)*, where a like argument was employed

unsuccessfully. The nature of that case, and the manner in which it was viewed by the Vice Chancellor, will appear from the following passage in his judgment: "The agreement is for the conveyance of traffic, that the company shall have the right of running with their engines, carriages, and trucks, and carrying traffic, upon the other line between certain points. Where you have these words in a grant, where you have a grant of a right of that kind, it is, I think, impossible to contend that the grant would have been void in its terms for uncertainty. It means a reasonable use—a use consistent with the proper enjoyment of the subject matter, and with the rights of the granting party. I think it is impossible to contend, that there is any such vagueness about it as entitles the defendant to say it is too vague a contract for this court to enforce."

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Parker v. Taswell (a) was another case involving considerable uncertainty, but the court decreed a specific performance of the contract. The case was an agreement for a lease, and the lessee had received possession, but the contract had not been executed further. The Vice Chancellor observed: "The duty of the court is, when the matter is subsidiary, to protect the possession lawfully acquired, and to enforce the agreement for a lease for a certain term, by arriving as nearly as it could at the intention of the parties as shewn by an imperfect instrument. The court, which had to decide a case of this kind, must endeavour to exercise a degree of discretion consistent with the justice of the case as it stood upon its own merits."

Judgment.

It is to be observed, also, that when a contract is executed on the one side, objections to the specific performance of it on the other side are not favored in equity. A few examples may be referred to as illustrating this doctrine.

(a) 4 Jur. N. S. 188.

1866. *Bottridge v. Great West'n Railway Co.* In *Price v. The Corporation of Penzance* (a) there was a contract by the Corporation for the purchase of the plaintiff's land; and it was argued that the Corporation should lay part of it out as a street, and should build, on another part of the land, "a good and commodious market for the sale of fish or other commodities." The contract contained nothing more specific as to this building. Sir *James Wigram*, the Vice Chancellor, after stating the facts, observed: "Under this contract the Corporation have taken possession of the land, and converted it; and having had the benefit of the contract in specie, as far as they are concerned, I need not say that the court will go any length which it can to compel them to perform the contract in specie." The necessity of a decree for specific performance was avoided there by the defendants afterwards performing it voluntarily. *Vide also Sanderson v. The Cockermouth & Workington Railway Co.* (b), *Pembroke v. Thorp* (c).

Judgment. In *Storer v. The Great Western Railway Company* (d) the company contracted to purchase part of the plaintiff's property at a price named, and to construct "one neat archway sufficient to permit a loaded carriage of hay to pass under the archway at such place as the plaintiff, his heirs and assigns, should think most convenient in his pleasure grounds, and should form and complete the approaches to such railway." The land had been conveyed; but this part of the agreement of the company had not been performed. The defendants urged various grounds of reason and authority for leaving the plaintiff to his remedy at law, contending that the performance of the agreement was so difficult as to be almost impossible. But the Vice Chancellor said:—"If the thing is reasonably possible, it must be done. The difficulty and expense of performing the contract, do not necessarily form an objection. In a case, I think of the *Brighton Railway*, before Lord

(a) 4 Haro, 508.

(b) 11 Beav. 497,

(c) 3 Swan, 437.

(d) 2 Y. & C. C.C. 48.

Cottenham, it was shewn that the expense of making a road would be very great and burdensome; but his lordship did not accede to that reasoning. * * I have no doubt that this work ought to be done: the only question is, whether it can be enforced on these pleadings; but I am clear that under some shape of the pleadings it can be enforced."

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So, in *Sanderson v. The Cockermouth and Workington Railway Company* (a) the plaintiff agreed to sell to the railway company certain land for a specified sum, "subject to the making such roads, ways, and slips, for cattle as may be necessary." The property was conveyed to the company accordingly; and the company entered, and formed the railway, but did not make the roads, ways, and slips, which the plaintiff desired; and the question was, whether there should be a specific performance of this part of the agreement. The Master of the Rolls decreed for the plaintiff, and observed: "It must be admitted that it is very difficult to execute an agreement expressed as this is; but the difficulty does not seem to me to be such as to make it proper for this court to decline exercising jurisdiction over the matter in dispute between the parties."

Judgment.

In *Sturge v. The Midland Railway Company* (b) the contract was, amongst other things, for a free pass. Specific performance was refused because of the uncertainty of the other parts of the contract; but it was not contended that the meaning of a free pass was too uncertain to admit of the contract being enforced.

The late case of *Ridley v. Ridley* (c) may be referred to as a further illustration of the doctrines of Chancery in reference to most of the questions I have been discussing. There a verbal promise had been made by an

(a) 11 Beav. 497.

(b) 4 Jur. N. S. 273.

(c) 11 Jurist, N.S. 475.

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 Railway Co. executor and trustee to his testator's children, that he would leave them by will "at least as much" as they would get under their father's will, in consideration of their confirming a sale he had made to his partner of the testator's real estate at a price which was admitted to be of itself the full and ample value of the property. But, notwithstanding that the promise was not in writing, that the evidence relating to it was contradictory (which the evidence here is not), that there was contended to be a vagueness in its terms, that the sale was at a full ample price—leaving no margin as a consideration for the promise (not to speak of an adequate consideration), still the heirs having subsequently confirmed the purchase, the promise was specifically enforced.

On these authorities I think the objection of uncertainty clearly unmaintainable as an answer to the plaintiff's claim.

Judgment.

The objections to the decree which I have been observing upon are those which were taken in the court below. The new objections taken here for the first time are, that the Rector had no power to accept for the land a free pass for himself and his successors; and that, if he had power to bargain for it, the company had no power to agree to it.

4. As to the first of these two objections, the argument is that, the consideration being of the character stated in the bill, some future Rector may object to the transaction, and may disturb the title which the company has to the land. Now, this disturbance would have to be in equity, if at all; for it was not disputed that the Rector's deed conveyed to the company a good legal title to the fee simple (a). But, however this may be, it is a clear rule in the law of vendors and purchasers that a vendee must take before conveyance all objections to the right

(a) *Vide* 9 Vic. ch. 81, sec. 80.

of his vendor to convey and give a good title; and that even delay, before any conveyance is actually executed, but after full knowledge, on the part of the vendee, of the nature of the title, may have the same effect (a). In the present case, not only has there been a conveyance, but there has been possession for many years under the conveyance; and the objection is now taken for the first time in the Court of Appeal, not having been taken by answer, or even in argument in the court below.

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After conveyance, the rule is, that, in the absence of fraud or the like, of which there is no pretence in the present case, a purchaser's only remedy for defect of title is on the covenants in his deed; and if these are such as give him no right of action in respect of the defect in question—and no pretence of such a right is set up here—he cannot, either at law or in equity, resist paying the consideration. On this point it is sufficient to refer to the text books (b), and to the authorities cited in them. This is the rule even where the consideration is a sum of money in gross, and no part of which may be forthcoming when the vendee is disturbed. Here, if a successful suit by a future Rector must be supposed possible, it would involve a surrender of the free pass from that time. The free pass can only operate as long as the title remains undisturbed in the company.

Judgment

I may add that no authority was cited for the proposition that the Rector had no power to contract for any but a money consideration; and I think it impossible for us to lay down such a rule. I cannot imagine, for example, that, in dealing with a railway company which needs some rectory land, the Rector has no power to provide, as an individual proprietor may,

(a) *Vide* Sugden V. & P. 353, et seq. 16th ed.; Dart on Vendors, chap. 10, sec. 2, p. 283, et seq.

(b) *Vide* Rawle on Covenants, 3rd ed., 611, *ad fin*; Sugden on Vendors, 14th ed., 549; Dart on Vendors, 3rd ed., 693.

1866. for the building and maintaining of an archway, as in *Storer v. The Great Western Railway Company* (a); or for roads, ways and slips for cattle, as in *Sanderson v. The Cockermouth and Workington Railway Co.* (b), instead of endeavoring to get in money the difference in value which the want of such works would occasion in respect of the remainder of the rectory property. If this point were a material one here, I think there could be no question of the propriety of applying that principle to such a case as this, in which the defendants say by their answer, "that the true consideration for the said premises so conveyed to us was the enhanced value of the remainder of the glebe, which we allege was a full and reasonable satisfaction for the same." Certainly no future Rector could complain, or could be heard to complain, or could have any object in complaining, that, in addition to a full and sufficient consideration of a legitimate kind, the present Rector had secured to his successors a further consideration, so valuable as to be an "exorbitant" and "extravagant" price for the premises. Yet this is what the defendants who file this answer contend for in appeal. We certainly cannot give defendants the benefit of a defence, if there was anything in it as matter of law, which is not only not set up by their answer, but is inconsistent with, and even negatived by, their own allegations of fact.

Judgment.

5. I pass now from the contention that the Rector made a bargain he had no power to make, to the contention that the defendants themselves exceeded their powers when they agreed to give a free pass over their road without limit as to duration. No authority was cited in support of this defence; and I see nothing in the policy of the legislature to forbid such contracts by railway companies. Thus the Railway Act, 22 Vic., ch. 66, sec. 11, sub-sec. 3, expressly provides for a railway paying a perpetual rent in certain cases for land taken. Indeed the learned counsel for the defendants

(a) 2 Y. & C. Cl. 48.

(b) 11 Beaven, 497.

did not argue that this company had not power to sell, 1866.
 for a sufficient money consideration, the right to a free Bettridge
 passage without limit as to time; and if the considera- v.
 tion of money would render valid such a contract, it is Great West'n
 plain that the consideration of money's worth must have Railway Co.
 the same force.

In *The Great Northern Railway Company v. The Manchester, Sheffield and Lincolnshire Railway Co.*, a contract was not considered objectionable for perpetuity, though it was held to provide for a permanent right of passage by one railway company over part of the track of another railway company, and the permanent use of some of the stations of the other company.

This objection appears, therefore, to be entirely unsustainable.

I may observe here, that equity judges of great eminence have expressed the strongest disapprobation of objections of *ultra vires* coming from these companies, Judgment.
 though, when such an objection is substantiated, effect must, no doubt, be given to it. Lord St. Leonards, in *Hawkes v. The Eastern Counties Railway Company* (a), made these observations on the subject: "It was argued with great force, and insisted upon, that the contract is illegal, because the company are applying the funds to purposes not authorized by the Act of Parliament, and in support of that argument several cases were cited. These were all cases in which the company were really going beyond their powers. One cannot but grieve to see great companies like these, with enormous capital, with a full knowledge of all their powers, and with legal advice constantly at their command, entering into an agreement, and then turning round upon the party with whom they have contracted, and endeavouring to evade the contract upon the ground that it is beyond their powers, and absolutely illegal on the face of it. One cannot but regret that companies should resort to so unseemly a defence in courts of justice. I do trust that

(a) 7 Railw. 216; affirmed 5 H. L. 381.

1866. *Bettridge v. Great West'n Railway Co.* we shall not hear of many more of these cases; but that these companies will take care that, in entering into contracts with individuals who were not so well protected, they will not go beyond their powers; for one cannot but feel that they entered into such contracts, if they be illegal, with perfect knowledge of their illegality. Nothing can be more indecent than for a great company to come into a court of justice, and to say that a solemn contract which they have entered into is void, not from any subsequent accident, not from any mistake or misapprehension, but on the ground of its not being within their powers; that is, because they thought fit to enter into it, meaning to have the benefit of it if it turned out for their benefit, and to take advantage of the illegality in case the contract should prove onerous, and they should desire to get rid of it. Such highly dishonorable conduct, I trust, we shall not often see in courts of justice."

Judgment. Vide also *The Shrewsbury and Birmingham Railway Co. v. The London and North Western Railway Co.*, (a). In the case in which the remarks of Lord St. Leonards were made, the company had not received possession or a conveyance of the land of which the plaintiff sought a specific performance, and did not need the land, or desire to have it, when they set up this defence. The contrast between such a case and the present is manifest.

On the whole, it seems to me clear that the new grounds of defence first thought of here, and those grounds of defence urged below, are equally insufficient to sustain a defence to the plaintiff's bill; and that the agreement is one which, under the circumstances, the plaintiff was entitled to have specifically performed.*

Per Cur.—Decree reversed; bill dismissed with costs.
[SPRAGGE and MOWAT, V.CC., dissenting.]

(a) 16 Beav. 441.

* SPRAGGE, V. C., was absent from indisposition when the judgment was delivered. MOWAT, V. C., however, stated that the learned Vice-Chancellor had desired him to say that he adhered to the opinion expressed by him in the court below.

CRAWFORD V. MELDRUM.

1866.

Fraudulent conveyance.

Where an insolvent person who was pressed by his creditors, and contemplated leaving the country in consequence of his embarrassments, made a conveyance of all his tangible property for an inadequate consideration to a relative who was aware of his circumstances, the conveyance was set aside as against creditors.

The plaintiff was an execution creditor of *Thomas Meldrum*, and the object of the suit was to set aside a conveyance he had executed to the defendant *Helen Meldrum*, as fraudulent and void against the plaintiff. The bill was filed the 16th of August, 1860. The defendant set up that the property in question was conveyed to her by the debtor for a valuable consideration, being a debt of £250 due her by him, and her bond for the support of the debtor's father, which was estimated to be worth £750.

The cause was heard before the Chancellor, at Barrie, on the 25th of November, 1864, when his Lordship pronounced the following judgment :

VANKOUGHNET, C.—According to the decisions in Judgment. equity, I must treat the consideration as to £750 as voluntary. It was agreed that this portion of the consideration should be paid to the son by a bond given to him for the support of his father during the residue of his life. No legal obligation on the part of the son to provide this support is alleged in the answer, and I think there is not sufficient evidence of any. It was, therefore, a voluntary disposition by *Thomas* of so much of his property, and cannot stand. There is, apparently some conflict between the cases at law and equity, as to how far a fraudulent intent will affect a deed when a *bond fide* consideration has been paid. Here, however, the £750 of consideration is voluntary, or rather property to that extent was handed over to the defendant *Helen*, upon a consideration which the law treats as voluntary.

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Meldrum.

It being alleged by counsel that the son *Thomas Meldrum* was bound by agreement, for value, to support his father, and that evidence of this could be given, his Lordship directed the cause to stand over, with liberty to the defendant to produce witnesses as to such agreement. Witnesses were accordingly produced, and after taking their evidence the following judgment was pronounced, on the 19th of January, 1865:

Judgment.

VANKOUGHNET, C.—Further evidence having been taken before me at Toronto, I have come to the conclusion that it was part of the arrangement under which the hotel property was conveyed by the father to the son, that the latter should support the former during the remainder of his life, and that the evidence of the son in this respect, taken under commission in California is thus corroborated. This being so, I think the son might make it a part of the stipulation and consideration under which he assigned over the property to the defendant, his aunt, that she should support his father. The sum estimated as an equivalent for this is the £750 above referred to. I cannot say, under the evidence, that this was an exorbitant calculation. It is true that while the old man's life was calculated at ten years' purchase, he died in about two years, the result of an accident; but that in no way invalidates the original transaction, which I think, therefore, I cannot declare void. The bill has been pending an unreasonable length of time, as if the plaintiffs were in search of evidence which they have not found: I dismiss it with costs.

This decision of the Chancellor was affirmed on rehearing before the full Court, Vice-Chancellor *Mowat* dissenting.

From the decree then pronounced the plaintiff appealed on the grounds (1), that the deed to *Helen Meldrum* was not intended to operate as a sale, but was on some secret trust in favor of *Thomas Meldrum*, and was a merely colorable contrivance to defeat his creditors; (2) that the consideration for such deed was grossly inadequate and must be taken to be fraudulent and void, as

against the creditors of *Thomas Meldrum*, and was in effect voluntary. 1896.

Mr. *Strong*, Q. C., and Mr. *Blake*, Q. C., for the appellant. Crawford v. Meldrum.

Mr. *Hector Cameron*, and Mr. *Moss*, for the defendant.

The Chancellor adhered to his judgment delivered on the original hearing.

SPRAGGE, V. C.—Upon the best consideration that I have been able to give to this case, and I have considered it with a good deal of attention, I am of opinion that the conveyance impeached by the plaintiff's bill is not void under the statute of Elizabeth.

The purchase was of three parcels of land. We must look at the transaction as a whole, as the parties themselves looked at it. If we isolate one part of it from the rest, and examine it by itself, it may appear open to observations, which taking the whole transaction together, would have much less force. Mr. *Blake* took the estimated value of the land, and deducting from it the amount of the incumbrance, took *Meldrum's* interest Judgment.

But there is practically a great deal of difference between property worth £1000, and property worth £2,500, subject to mortgages to the amount of £1,500; the former is much more valuable for investment, the latter is burdened with incumbrances, and upon a forced sale might bring little or nothing beyond them.

Again, Mr. *Blake*, took the purchase of the tavern property, and examined it by itself, and said with much force that its value was taken at £750, and that the consideration was in effect, as computed, the payment of £75 a year for ten years. That taken by itself would be such inadequacy of consideration as to be evidence of fraud, but still not conclusive for as fraud, not inadequacy of consideration *per se.*, is the vice that makes the conveyance void under the statute, so the inference of fraud may be rebutted by anything that tends to negative fraud. For instance,

1866. it might be shewn that they computed the value upon a wrong basis by mistake, for if they erred innocently, the error could not be fraudulent. For instance, if unskilled persons used the tables of an actuary, and drew a wrong conclusion from them, and made the conclusion the consideration for a conveyance, it might be a ground for setting aside the conveyance, as between the parties on the ground of mistake; but could not be a ground for setting aside a conveyance at the suit of creditors, on the ground of fraud; and I apply the case I have put in this way. Persons not of business habits, and especially females, do not readily apprehend and take into account the difference that is really made by the paying or receiving of interest. Such a person buying land for an aggregate sum of £750, spread over ten years without interest, would be apt to say and to think that £750 was the price of the land. I do not mean to say that, such a purchaser would not see that there was a difference between so paying, and paying cash in hand, or paying by instalments with interest; but they would not appreciate all the difference that really exists.

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I am supposing at present that *Meldrum* was under a legal as well as moral obligation to pay £75 a year; which I will suppose to be an annuity to his father, charged upon the tavern property. Having to meet this liability and charge, and being at the same time indebted to Mrs. *Meldrum* in something upwards of £300, he enters into a treaty with that lady to discharge the two obligations; and here, in looking at the question of fraud, we must consider the natural, and I have no doubt, real anxiety of *Meldrum* to leave his father in charge of a person who would not only provide for his comfort, but bare with his bad habits and infirmities of temper; and on the other hand, the reluctance of that person to take such an onerous and disagreeable charge. Putting creditors for the moment out of the question, Mrs. *Meldrum* was in a position to almost dictate her own terms. It was not an ordinary case of a sale of land, where one man's money is as good as another's;

but a case where a large proportion of the consideration was of so peculiar a nature that one particular person was greatly to be preferred as the purchaser.

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No doubt in discussing the matter between *Meldrum* and his aunt, the value of each parcel of land was talked over. I think, from the evidence, that the aunt rightly considered *Meldrum's* estimate too high, and that *Meldrum* himself probably states correctly the result at which they arrived when he says, "I estimated the property at about £2,500, at the time. *Helen Meldrum* considered this too high; upon which I agreed to take £250 in cash; she to assume the mortgages on the property, and support my father during his life."

It is a kind of bargain to which the language of English judges, that you cannot in cases under the statute weigh the adequacy of the consideration in over-nice scales, applies with particular force.

Judgment.

His Lordship the Chancellor, when the case was first before him, held it necessary for Mrs. *Meldrum* to prove a binding legal contract on the part of *Meldrum* to support his father. I do not myself feel clear that it was necessary to prove this, it being proved that Mrs. *Meldrum* had herself entered into a bond with *Meldrum* to support his father; for independently of contract, it was, I apprehend, not only a matter of moral and religious duty on the part of the son, but a matter of legal obligation. Sir *William Blackstone* in his *Commentaries*, (vol. I., 454,) lays it down that he is legally bound, and quotes a statute of Queen Elizabeth as authority.

It is contended that in this case the conveyance of the tavern property by the father to the son, in or about 1837, created no legal liability, and that at most it created only a charge upon the land. The evidence is that the conveyance of the land was the consideration

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for the undertaking on the part of the son to support his father. I think there is no room to doubt that, supposing the promise made by an adult, it would be legally binding; and not only a charge upon the person, it would be also a charge upon the land, as was determined in this court in the case of *Paine v. Chapman*. But, it is objected, the son was a minor at the time, and his promise was not binding. This may be conceded, and that he was at liberty upon coming of age to repudiate the transaction; this he did not do, but ratified and confirmed it. He continued to hold the tavern property, and acknowledged his obligation to discharge the consideration and condition upon which he had received and still held it; and I apprehend he could not continue to hold it discharged of that obligation. Besides, although not of legal age to give him a capacity to contract, he was of sufficient capacity mentally to understand the transaction, and to be guilty of a fraud; and it would, I apprehend, be fraud in him to take the conveyance, and not intend to fulfil the conditions, and a fraud when he came of age to hold to the one and repudiate the other. Upon these two points—fraud on the part of one not of full age, and ratification after coming of age—I would refer shortly to the cases collected in *Leary v. Rose* (a) in this court. I desire to refer also, as bearing generally upon the transaction in question to *Gale v. Williamson* (b).

In judging of this transaction, this important consideration must be borne in mind. It was a real, and not a colorable transaction; and there is not the least reason to suppose that the conveyance was made in the slightest degree in order to benefit *Helen Meldrum*. She was, in the eye of the law, a stranger; and this case cannot be put higher for the plaintiff than that it was a sale to a stranger, who was also a creditor, for an inadequate consideration; and with regard to consider-

(a) 10 Gr. 346.

(b) 8 M. & W. 405.

ation, this must be taken into account, that the sale took place at a time of great monetary depression—August, 1858—when the market value of land had greatly fallen, and it was difficult to find purchasers at almost any price. And I have been struck with the circumstance that a part only, and not the whole of the debt, due by *Thomas* to *Helen Meldrum*, was applied on account of the consideration money. It looks like the result of an actual computation of value—erroneous possibly, but still in good faith.

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If the parties had thought it necessary to give to the transaction the *appearance* of paying a full consideration, it would have been easy to add to it the balance of the debt. And to all these considerations is to be added, the reluctance of *Helen Meldrum* to make the purchase at all. She evidently did not look upon it as so desirable, or at any rate thought the advantages to be obtained outweighed by the burthens that would be imposed.

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Her knowledge of the embarrassed state of *Thomas Meldrum's* affairs is a reason, no doubt, for scrutinizing the transaction narrowly. He appears, however, to have been of a somewhat sanguine temperament, and probably represented them as not so bad as they really were. But taking it that she knew that the effect of her purchase would be to disappoint some of the creditors, unless that was her motive for making the purchase, it will not be a reason for avoiding it. Suppose her entirely unconnected with *Thomas Meldrum*, but a creditor to something over £300, and that he was bound to provide maintenance, clothing, and all other necessities, for a stranger, for his life, and a bargain made in the same terms as the one in question, I do not see how it could be successfully impeached. This being between relations should be examined more jealously; but, after all, must be decided by the same rules.

My conclusion upon the whole of the case is, that

1866. while I think the consideration was inadequate, still, looking at all the circumstances and the time of depression when the purchase was made, not so inadequate as to be evidence of fraud, and that the surrounding circumstances tend to negative fraud. At the most it is open to suspicion only, and in my mind not of very strong suspicion. Suspicion, at any rate, is no ground for a decree, but as was said by Sir *Richard Kindersley*, V. C., in *Hale v. The Saloon Omnibus Co. (a)*, "though a ground for rigid inquiry, is not a ground, if it remains only suspicion, for an adverse decree."

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Judgment. *MOWAT*, V. C.—This is a bill by an execution creditor of *Thomas Meldrum* to set aside a conveyance executed by him on the 1st of August, 1858, in favor of the defendant *Helen Meldrum*, of all the real estate he then had, consisting of a farm in Oro, and some property in the town of Barrie. The plaintiffs allege that this conveyance is void as against the creditors of *Thomas*.

At the time it was executed, it is clear that the grantee was largely indebted, and was insolvent; that his creditors were pressing him; that an execution at the suit of one of them was about to be placed in the sheriff's hands; and that he had no means of paying what he owed, except the property in question, and whatever he might be able to realize out of the debts that were due to him. The value of his interest in the property was estimated by the parties at the time, at £1,000; and I think that, upon the evidence, this may be taken as its real value on a fair sale.

It is said that the grantee, Mrs. *Meldrum*, gave for the conveyance a consideration equivalent to this value, viz., a debt of £250, said to have been due to her by

(a) 4 Drewry, at 499.

Thomas, and her bond for the maintenance of the father of *Thomas* for the remainder of his life, and which is alleged to have been accepted as payment of the remaining £750. 1866.

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Of the alleged indebtedness to Mrs. *Meldrum* herself, who was the aunt of *Thomas*, and had been keeping house for him for the preceding six years, the evidence is her own oath and the deposition of *Thomas* taken on commission.

As to the bond, there is no evidence except that of the nephew and aunt themselves, that it was ever executed. A bond was prepared by Mr. *Ardagh*, but was not executed in his presence; and no one testifies to having been present when a bond was executed, or to having seen it afterwards. No bond is produced, none was delivered to the father, who alone was interested in it; and none was placed in the custody of any person for him. *Thomas's* story is, that, when he was preparing to leave the province, he packed up the bond with certain other effects of his own, and left them in the custody of Mrs. *Meldrum* herself. (Vide *Eveleigh v. Purssord* (a). It is not alleged that any mortgage was taken or any lien reserved on the property, as a security for the performance of Mrs. *Meldrum's* undertaking. Judgment.

The answer does not set up that *Thomas* had come under any liability to maintain his father, or that this provision in his favor was more than a voluntary provision. Evidence, however, has been put in to establish such a liability; and as this evidence has been discussed, I have considered the effect of it. It professes to make out that there was a verbal promise or undertaking, by *Thomas*, twenty-one years before the transaction in question; and when he was a youth of eighteen or nineteen years old, that his father had at that time (1839)

1866. conveyed to *Thomas* a property in Barrie, then worth £300; and that the promise was the consideration for this conveyance. But, whatever took place on the subject, I think there was no idea of the father's living thenceforward in idleness, or of imposing on *Thomas* a legal obligation to support him. Mrs. *Meldrum* herself does not say there was any such obligation. *Thomas* does not appear to have represented anything of the kind to her, or to Mr. *Ardagh*, to whom he stated the facts when he had the bond prepared. The son was a minor at the time, and therefore unable to contract. A formal deed was made to him, containing no allusion to what is now alleged to have been the object of it and the consideration for it. No writing was taken from him at the time, or given, or applied for, after he came of age. He is not proved to have been supporting his father since; the contrary rather appears; for *Thomas* says his father was strong and active up to the time of his leaving the country; and he mentions a situation his father held, and for which he received a small salary; and he declares that his father actually assisted him in paying for the property which *Thomas* subsequently purchased. *Thomas* mortgaged the property he got from his father, and afterwards conveyed to Mrs. *Meldrum* his equity of redemption, without any objection that we hear of on the part of the father.

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If there ever was a legal claim on the part of the father, there is nothing in the evidence to indicate that *Thomas* was ever under any personal liability for it. He was a minor when the alleged promise was made, and six years had more than thrice passed before his bargain with Mrs. *Meldrum*.

If the legal claim, though not involving a personal liability, was a lien on the property which the father had conveyed—a thing which it would be most difficult to make out—the lapse of time was a bar to the lien. Nothing is alleged or proved that would take the case out of the Statute of Limitations.

The proposal for the so-called sale by *Thomas*, which is now in question, came from *Thomas*; and Mrs. *Meldrum* deposes that it was urged on her repeatedly before she agreed to it. The proposal was to purchase the property and keep his father. "My nephew said if I would not do this, he must look out for some one else to take care of him, as he could not take him away with him," The maintenance of the father, and not the payment of the debt said to have been due to Mrs. *Meldrum*, was the primary object of the son; but if the son desired nothing more than to discharge honestly a legal liability he was under to his father, his proper and natural course would have been to withdraw from his other creditors no more of his property than was necessary for this purpose. A mortgage to his father, or to Mrs. *Meldrum*, would have secured this object—or, as money lent on mortgage was bringing ten or twelve per cent, a sale at a fair price would have supplied a fund, yielding an income considerably more than was necessary for the old man's support, without abstracting any part of the principal from other creditors.

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The amount allowed was also probably three times what it should have been. The father was an old man of seventy, and of dissipated habits. The most intelligent of the defendant's witnesses calculates his expectation of life at five years; but the parties assumed ten years, which would have been too long if he had been a sober man. A larger annual sum was agreed to in consequence of the old man's dissipated habits and bad temper—considerations which could not have been taken into account for this purpose, if the old man had been himself suing; and yet this, I apprehend, was the proper criterion in considering the question of legal obligation, and justifying the preference by *Thomas* of one creditor over the rest.

Finally, Mrs. *Meldrum* was allowed this excessive rate, for this excessive period, in advance, without any

1866. deduction. The grossness of such a mode of calculation seems to me to place its good faith out of the question.

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Now, inadequacy of consideration does not necessarily shew fraud in the grantor; a sale at a low price may happen, in a particular case, to be the most prudent thing that an honest debtor can do; and may, on the whole, be for the advantage of creditors; *Lee v. Hart (a)*, *Bittlestone v. Cooke (b)*, *Whitmore v. Claridge (c)*; but, ordinarily, and when there is no pretence of that kind, the inadequacy of the consideration is of great weight as evidence of a grantor's fraudulent intent. I think the authorities require us so to hold.

One of the rules laid down in *Twyne's* case (*d*), for obtaining a valid conveyance from one who is indebted to others is this: "Let the goods and chattles be appraised by good people, to the very value, and take a gift in particular in satisfaction of your debt." So, *Judgment.* in *Mathews v. Feaver (e)*, Sir Lloyd Kenyon, then Master of the Rolls, laid down the same doctrine. The bill there was by creditors to set aside a conveyance by their debtor; and this is the language of that distinguished judge: "If the conveyance had been made without any consideration, it would certainly have been void under the statute; and I am of the same opinion where the consideration is entirely inadequate. It is true, as between vendor and vendee, the court will not weigh the consideration in golden scales; but this is a transaction between the father and the son, and natural love and affection is mentioned as part of the consideration, upon which, as against creditors, I cannot rest at all." The Master of the Rolls then proceeded to state that he was not satisfied as to the value of part of the assigned property; and his decree was a reference to

(a) 11 Ex. 880.

(b) 6 E. & B. 808.

(c) 8 Jur. N. S. 1059.

(d) 8 Coke, 80.

(e) 1 Cox, 278 (1785).

the Master to inquire the value of the property; and further directions and costs were reserved. 1866.

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I have met with no case in equity in which a different doctrine has been held.

In the late case of *Hale v. The Saloon Omnibus Co.* (a), where the sale was under the circumstances upheld, the goods which were the subject of the sale had been valued by an experienced auctioneer, whose opinion was, that if the intending purchaser gave £300, which sum was somewhat less than he afterwards paid for them, it was as much as he ought to give (b); and the learned judge observed upon the consideration thus paid, and said that it had been shewn under the circumstance of the case to be sufficient.

In *Bott v. Smith* (c), where the impeached transaction was set aside, the circumstance that a full consideration was not given, was remarked upon by the Master of the Rolls in the judgment he pronounced.

In the still later case of *Stokoe v. Cowan* (d) the Master of the Rolls set aside an assignment of a life policy, as void against creditors, on, apparently, the sole ground of the inadequacy of the consideration, the debt, in satisfaction of which the assignment was made, not being one-third of the value of the policy.

Reported cases do not indicate that the doctrine of the common law courts differs much from that of courts of equity upon this point—*Dewey v. Bayntun* (e). Some of the cases, in which transactions impeached by creditors have been upheld at law, were cases of mortgages for money actually lent or paid, as in *Darvil v. Terry* (f), and *Eveleigh v. Purssord* (g). See also

(a) 4 Drewry, 490.

(c) 21 Beaven, 511 (1856).

(e) 6 East, 257.

(g) 2 M. & Rob. 39.

(b) *Ib.*, 497.

(d) 29 Beav. 637.

(f) 6 H. & N. 809.

1866 *Hall v. Kissock* (a). In other cases the purchaser had bought the property at sheriff's sale, as in *Latimer v. Batson* (b), and *Williams v. McDonald* (c); or had taken the property at a valuation, as recommended by Lord Coke, of which *Wood v. Dixie* (d) is an example.

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The claim of creditors stands in a much more favorable position than that of a voluntary grantee can ever do; yet, even in a contest between two conveyances, the first of which is entirely voluntary, and the second is alleged to be for value, and therefore under 27th Elizabeth entitled to precedence, the amount of the consideration, as compared with the actual value of the property, is not immaterial. In *Metcalf v. Pulvertoft* (e) we have this observation by Lord Eldon: "If the estate has, as it is alleged, been purchased at a third part of its value, then, according to the case decided by Lord Mansfield, that purchase would not prevail against the voluntary settlement." The principle of this rule has been recognised and acted upon in the common law courts, though the same proportion has not been suggested as a measure of the inadequacy necessary to be established.—*Upton v. Basset* (f), *Doe v. Routledge* (g), *Parry v. James* (h). Vide also *Bullock v. Sadler* (i).

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So in bankruptcy, sales for a fair price have been held valid, which, if the price had been inadequate, would have been set aside—*Baxter v. Pritchard* (j), *Graham v. Chapman* (k).

In *Lee v. Hart* (l) Parke, B. observed, in reference to cases of this kind: "Buying goods at an under-rate

(a) 11 U. C. Q. B. 9.
(c) 7 U. C. Q. B. 382.
(e) 1 V. & B. 184.
(g) Cowp. 705.
(i) Amb. 764.
(k) 12 Com. B. 85.

(b) 4 B. & C. 652.
(d) 7 Q. B. 892.
(f) Cro. Eliz. 445.
(h) 16 East. 212.
(j) 1 A. & E. 456.
(l) 10 Ex. 560.

would be evidence of a guilty knowledge, if the vendor had no right to sell; and if the purchaser had been indicted for receiving stolen goods, knowing them to be stolen, that fact would have been evidence of such knowledge."

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The remedy for frauds against creditors may be either legal or equitable. There are other cases in which the only remedy is in equity, and in which so much importance is attached to the adequacy of the consideration, that the validity of the transaction may entirely turn upon it. Such, for example, are the cases of purchases by solicitors from their clients (a); purchases by trustees from their *cestui que trust* (b); and purchases, by any one, of the reversionary interest of an heir (c). There are many other cases in which relief has been granted in equity on the ground of the inadequacy of the consideration. See, for example, the cases collected in 1st *Chitty's Equity Index*, 510 (d). The reasons for attaching so much importance to the fairness and sufficiency of the consideration in these cases are not stronger than in the case of a purchase from an insolvent of all his available property by a person who is aware of his insolvency and want of other means.

Judgment.

A voluntary deed is clearly void as against creditors, however meritorious a consideration it may have; and it is obviously as great a fraud on creditors for an insolvent to put his property out of the reach of creditors, by transferring it to a friend at an under value, as by transferring it to him without receiving for it any valuable consideration. I cannot imagine that, in equity, an insolvent who owes one creditor £100, can avail himself of that debt to give his creditor £200. Indeed, at law, the reverse was expressly laid down by *Gibbs*, Chief Justice, in *Benton v. Thornhill* (e); and

(a) Story, Eq. Jur., sec. 311, 312, 312a.

(b) *Ib.*, 321, 322.

(c) *Ib.*, 332 to 339a, 347, 348.

(d) 2nd Ed.

(e) 2 Marshall, 430.

1866. the language of *Cresswell*, J., in *Halle v. Alnutt* (a) (a case in bankruptcy) was to the same effect: "If a man, having many creditors, assigns to one of them property exceeding in value the amount of the debt, to the extent of the excess, he thereby defeats and delays the others." I cannot suppose, either, that, according to the principles acted upon here, if an insolvent wishes to make a relative or friend a gift of *A*, all he has to do is to add to it another property *B*, and to receive the value of *B* in consideration of the conveyance of the whole. I cannot believe that the law of this court allows an insolvent to cheat his creditors, if he can only get some one to assist him in doing so, by giving him for the property, to which his creditors are entitled, a fraction of its value, such person knowing at the time his circumstances.

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Judgment. I think there is nothing in *Wood v. Dixie* (b), or in the cases at law, in England or in this country, which have followed *Wood v. Dixie*, that establishes any such conclusion as the settled doctrine of courts of common law, any more than of courts of equity. It may be true that a sale of property for good consideration is not void at law, merely because it is made with intent to defeat the expected execution of a judgment creditor; but I have no idea that an insolvent about to abscond may, with such an object, make a valid legal transfer of his property for a mere fraction of its value. The reality of the transaction—the absence of any trust—is not sufficient to support a voluntary conveyance; and I see no reason for supposing that it is sufficient to uphold at law, any more than in equity, a so-called sale, where the consideration is such as no man, whom it concerned to make the most of his property for himself or his creditors, would have accepted. In *Wood v. Dixie* the property was taken by the purchaser at a valuation; and there was no

(a) 18 C. B. 505.

(b) 7 Q. B. 892.

suggestion that the sum was not the full value. In 1866. *Williams v. McDonald* (a) the impeached transaction was supported, expressly on the ground that the alleged sale was not only a real sale, but was also for the full value of the goods, as ascertained in the ordinary way in which such a sale as was there in question takes place.

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If Mrs. *Meldrum* had had no notice that there were other debts, except those for which the transaction provided, and the transaction had been otherwise unimpeachable, the amount of the consideration which she was paying would have been immaterial; as in *Nunn v. Wilsmore* (b), *Holmes v. Penny* (c), *Thompson v. Webster* (d), *French v. French* (e), and *Lee v. Hart* (f).

But there is no doubt Mrs. *Meldrum* was fully aware that there were other debts; and aware that it was in consequence of this that her nephew wished to make over this property to her; and that for the same reason he contemplated leaving the country, unless some lucrative office or contract should in the meantime come in his way. She was aware, too, that, in consequence of the state of his affairs, he had practically ceased to carry on his business; that he had no means for paying his creditors except the property in question and the debts which might be due to him; and that the result of the conveyance to her would be to delay and hinder all other creditors; and the rule of law is, that she must be taken to have intended the result which was thus to follow from the transaction to which she became a party—*Pennell v. Dawson* (g); even though it did not occur to her at the time that the transaction would be regarded as a fraud on creditors; and though the trans-

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(a) 7 U. C. Q. B. 382.

(c) 3 B. & J. 97.

(e) 6 D. M. & G. 101

(f) 10 Ex. 555.

(b) 8 T. R. 521.

(d) 5 Jur. N.S. 668, 921;

& 7 Jur. N.S. 581.

(g) 18 C. B. 361.

1866. action was pressed on her by her nephew, and entered into by herself with reluctance.

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On the whole it seems to me clear that the transaction was, in equity, void as against creditors.

From these decrees the plaintiffs appealed, on the grounds, that the transaction impeached in the cause was not designed to take effect as a sale in good faith to the defendant *Helen Meldrum*, but was upon a secret trust in favor of the defendant *Thomas Meldrum*, and was merely a colorable contrivance to defeat the creditors of the said *Thomas Meldrum*; and also that the consideration for the impeached conveyance was so grossly inadequate, that the same must be taken to be fraudulent and void as against the creditors of the said *Thomas Meldrum*, and that the same was in effect a voluntary conveyance.

Statement.

In support of the decrees the defendant submitted, that she was a *bond fide* purchaser in good faith of the property in question for full value; and that her title could not be impeached on the law and evidence in the case.

On the appeal Mr. *Strong*, Q. C., and Mr. *Blake*, Q. C., appeared for the appellants.

Mr. *Hector Cameron* and Mr. *Moss* for respondents.

The following cases were cited—*Strong v. Strong* (a), *Herne v. Meeres* (b), *Luff v. Horner* (c), *Henderson v. Lloyd* (d), *Holmes v. Penney* (e), *French v. French* (f), *Leary v. Rose* (g), *The Dublin and Wicklow Railway Co. v. Black* (h), *Holmes v. Blogg* (i), *Corlett v. Radcliffe* (j).

(a) 18 Beav. 408.

(c) 8 F. & F. 480.

(e) 8 K. & J. 90.

(g) 10 Gr. 848.

(i) 8 Taunt. 85.

(b) 1 Vern. 465.

(d) 8 F. & F. 7.

(f) 6 DeG. M. & G. 95.

(h) 8 Ex. 181.

(j) 14 Moo. P. C. 121.

After taking time to look into the cases, the judgment 1866.
of the court was delivered by

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DRAPER, C. J.,* who said that the majority of the judges present were in favor of reversing the decree pronounced by the court below, on the grounds stated in the judgment of Vice-Chancellor *Mowat*; and therefore it was unnecessary for him to say more than that he fully concurred in the views expressed by the learned Vice-Chancellor.

RICHARDS, C. J., said, although he entertained some Judgment.
doubts upon the case, still as a majority of the Judges agreed in the views expressed by the learned Chief Justice of Upper Canada, he would not delay the decision of the case any longer, and would therefore concur in allowing the appeal.

* SPRAGGE, V. C., was absent on account of illness when judgment was pronounced.

1866.

ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

MILLS V. KING.

Practice—Arbitration.

On a reference to arbitration at *Nisi Prius* the order required the arbitrator, at the request of either party, to state any special facts for the opinion of the court; and the court was thereupon empowered to direct the verdict to be altered or amended, as the court might think proper. The arbitrator having stated a case for the opinion of the court, the court made a rule thereon, and an appeal was brought against the judgment or decision expressed in the rule.

Held, that no appeal would lie, and that as judgment had not been entered, error could not be brought.

Appeal from the Court of Common Pleas. The judgment in that court is reported in 14 U. C. C. P. 263.

Statement. The respondents objected—1. That the decision of the Court of Common Pleas now sought to be appealed against by the defendants, is not the subject of appeal.

2. That no appeal lies upon an interpleader issue.

3. That no appeal lies upon a special case stated by an arbitrator.

Mr *Strong*, Q. C., and Mr. *Burton*, Q. C., for the appeal, referred to *Wilson v. Kerr* (a), and the practice as to special cases as pointed out in sections 157 & 162, C. L. P. Act, U. C.

Mr. *Crooks*, Q. C., contra, cited *Attorney-General v. Sillem* (b), *King v. Simmonds* (c), *Withers v. Parker* (d), *Gumm v. Tyrie* (e), *Wheelton v. Hardisty* (f),

(a) 17 U. C. Q. B. 168.

(b) 10 Jur. N. S. 446.

(c) 7 Q. B. 289.

(d) 4 H. & N. 810; 2 Lush. Prac., ed. of 1865, 775; C. L. P. Act, (English) 1860.

(e) 13 W. Rep. 436; 4 B. & S. 680.

(f) 5 Jur. N. S. 14.

Elliott v. Bishop (a), *Baggalay v. Borthwick* (b), 1866.
Howell v. London Dock Co. (c).

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 King.

The judgment of the court was delivered by

DRAPER, C. J.—This was an ordinary interpleader, to try the title to certain goods taken in execution by the sheriff of Wentworth, under a *fi. fa.* The plaintiff below was the claimant, and the defendants were the execution creditors. The interpleader order directed the question to be tried by a jury. At *Nisi Prius* a verdict was taken for the plaintiff by consent, and an order for a reference was made by which, among other things, it was declared competent to the arbitrator and he was required, at the request of either party, to state any special fact for the opinion of the court, who were thereupon empowered to direct the verdict to be altered or amended, and entered as to the goods as to which such special fact might be found, either for the claimant or execution creditors, as the court might think proper. Judgment.

The arbitrator "stated a case" for the opinion of the court, and afterwards the court made a rule ordering that the verdict already entered for the plaintiff should stand, as to certain of the goods in question, with certain exceptions, and as to the goods excepted, and certain other goods, the verdict was to be entered for the defendants.

No proceeding appears to have been taken in the court below since the rule was made. The appeal is against the judgment or decision expressed in the rule. But the appeal is premature; or rather, the appeal does not lie; and as the judgment has not been entered, error cannot be brought.

(a) 11 Exch. 321.

(b) 10 C. B. N. S. 61.

(c) 2 L. T. N. S. 604; 6 Jur. N.S. 676.

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Consol. Stat. U. C., ch. 22, sec. 157, enables parties after issue joined by consent, or order of a judge of the court in which the action is pending, to state the facts of the case in the form of a special case. Sec. 162 enables the arbitrator (*sud sponte*) on any compulsory reference under the act, or on any reference by consent where the submission is or may be made a rule of court, unless the contrary be proved, to state his award as to the whole, or any part thereof, in the form of a special case for the opinion of the court.

Judgment.
An appeal shall lie from a judgment upon a special case in the same manner as from a judgment upon a special verdict, unless the parties agree to the contrary, and the proceedings for bringing a special case before the Court of Error and Appeal shall, as nearly as possible, be the same as in the case of a special verdict, and that court (*i. e.*, of Error and Appeal,) shall draw any inference of fact from the facts stated in the special case which the court by which the case was originally decided ought to have.

This provision differs in words from the English C. L. P. Act of 1854, which (sec. 32,) instead of saying "an appeal shall lie from," enacts that "error may be brought upon," &c. But the English statute contains the following provision, not to be found in our Consolidated Act; that the Court of Error shall either affirm the judgment, or give the same judgment as ought to have been given in the court in which it was originally decided; but the 11th section of our Consolidated Act contains in substance and effect the same provisions, as applicable to all cases brought before it.

The term "appeal," is used in the act as meaning the same thing as bringing a writ of error, except where the more technical and precise sense of each term, and specially of "error," is from the context obviously intended.

ON APPEAL FROM THE COURT OF CHANCERY.

1866.

WEIR V. MATHIESON.

University—Removal of Professor—Jurisdiction.

The trustees of Queen's College, Kingston, removed a professor in their discretion. *Held*, reversing the judgment of the court below, that there was no jurisdiction in equity to interfere for his restoration, &c., and that, under the charter, a sufficient number of trustees might remove in their discretion.

This was an appeal from the decree of the Court of Chancery, as reported in volume xi. of the Reports of that court, page 383, where the facts of the case are fully set forth. From that decree the defendants appealed on the following, amongst other grounds:

That the Court of Chancery did not possess jurisdiction to grant the relief which it assumed by the decree to give to the plaintiff; that the jurisdiction to give the relief sought by the bill is exclusively confined to the visitor or visitors of the University of Queen's College; Statement. that the plaintiff's proper mode of redress for the supposed injury of which he complained was by an appeal to the Crown, her Majesty the Queen being the visitor of the University; that the trustees had a jurisdiction, final and conclusive, and free from all control of the ordinary courts of justice, in the matter of the removal of the plaintiff from his office; that the plaintiff's tenure of office was not during good behaviour, or "*ad vitam aut culpam*," but during pleasure only; that the relief sought by the bill is, by reason of the personal and confidential character of the office of a professor in the said University, beyond the scope of the jurisdiction of a court of equity; that the decree in effect gives relief by way of a specific performance in a case where the remedy is not mutual, inasmuch as the Court of Chancery does not possess jurisdiction to compel the plaintiff to perform the duties of the office of professor; and that the trustees had power to do what is complained of in dismissing the plaintiff, and if such dismissal was wrongful, plaintiff's remedy was by action at law only.

1866. In support of the decree the following reasons were assigned by the plaintiff, viz.: That the circumstances stated in the pleadings and appearing in evidence gave the Court of Chancery jurisdiction to restrain the defendants from interfering with the plaintiff in the performance of his duties as professor of classical literature in the University of Queen's College; that the action of the defendants in endeavouring to remove the plaintiff from his said professorship, without cause assigned, or complaint proved, was in violation of the powers and duties of the trustees of Queen's College under their royal charter of incorporation; that such action of the defendants was not only illegal, but entered upon *mala fide*, and demanded the interference of the Court of Chancery; that the defendants, as trustees of the said incorporation, are governed by the regulations of the charter with reference to their powers and duties, and any attempted violation of such regulations it is the province of the Court of Chancery to restrain; that the plaintiff was, as well under the provisions of the royal charter, as under the general principle of law in that behalf, entitled to be notified of any grounds of complaint, and to be heard thereupon before he had been removed by the defendants; that the trustees of Queen's College had no summary power of dismissal over the professors of the said college; that the statutes of the said trustees, which assume to confer such power on the trustees, are illegal and contrary to the royal charter of the said college; that the plaintiff was not guilty of, or in any way answerable for, the alleged difficulties in Queen's College, which were the ostensible reason for the summary proceedings of the trustees, when they ordered his dismissal; and that upon all or any of the grounds taken in the Court of Chancery, the plaintiff was entitled to the decree pronounced herein.

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Statement.

Mr. Strong, Q.C., Mr. M. C. Cameron, Q. C., and Mr. McLennan, for the appellants.

This college is what is known in law as a charity, 1866. the government of which is vested in a visitor or visitors. Where a private individual founds a charity he is the visitor, and where the crown is founder, without nominating a visitor, the Queen is visitor, and the power is exercised by the Lord Chancellor sitting *in camerâ*. Here the crown grants a charter, and the endowment is by private bounty, and if no visitor were appointed, the visitatorial power would be vested in the crown. Trustees, however, are appointed by the charter, with very large and comprehensive powers—visitatorial powers in short; and though they are not named visitors, yet they are such in fact. They are to perform the function of visitors. There is no magic in the word visitor, and the trustees here, though not so named in terms, are such in effect.—*Green v. Rutherford* (a), *Attorney-General v. Lock* (b), *Philips v. Bury* (c), *Attorney-General v. Crook* (d), *Ex parte Wrangham* (e), *Attorney-General v. Clarendon* (f), *Attorney-General v. Black* (g), *Queen's College, Cambridge*, (h) *Attorney-General v. Dixie* (i) *Dartmouth v. Woodward* (j). Weir
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The powers of the visitor are without control, excluding the case of a misappropriation of the revenues where they have the management of them.—*Attorney-General v. Lock*, *Philips v. Bury*, *Attorney-General v. Foundling Hospital* (k), *Dr. Walker's case* (l), *Whiston v. Rochester* (m), *Regina v. Rochester* (n).

The Court of Chancery has erroneously assumed jurisdiction in this case on the ground of a trust in favor

(a) 1 Ves. 472.

(b) 3 Atk. 164.

(c) 2 T. R. 352, and S.C. 1 Ld. Raym. 5; 2 Kent's Com. 274, 303.

(d) 1 Keen, 121; 1 C.P. Cooper Rep. 33; Story's Com. 1191; 2 Kyd on Corporations, 195; Lewin on Trusts, 495.

(e) 2 Ves. jr. 609.

(f) 17 Ves. 498.

(g) 11 Ves. 191.

(h) Jacob, 1.

(i) 13 Ves. 519.

(j) 4 Wheaton, 681.

(k) 2 Ves. jr. 42.

(l) K. B. Hardw. 212.

(m) 7 H. 545.

(n) 17 Q. B. 1.

1866. of the plaintiff. The case of a schoolmaster, in whose favor there has been a grant of land, or for whose benefit the income of land is appropriated, is the undoubted case of a trust; but there is nothing of the kind here. This case is not distinguishable from *Whiston's* case.—*Attorney-General v. Magdalen Coll. (a), Regina v. Rochester (b), Regina v. Chester (c), Regina v. Darlington (d).*

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In the 15th clause of the charter it is stated that the trustees *may* institute an inquiry; when a complaint is made, this is imperative. When there is a complaint it is obligatory on the trustees to proceed, however reluctant they may be. This does not abridge their power to proceed without complaint, and in the exercise of their discretion; this is clear from *Attorney-General v. Lock*, already cited.

Argument. The case of *Willis v. Childe*, which will be cited on the other side, is clearly distinguishable, for in that case there was an obvious trust. The same is true of the other cases which were relied on by the Vice-Chancellor in the court below.—*Phillip's Charity (e)* and *The Fremington School* case (*f*). In these cases there was a trust in favor of the schoolmaster; he was the corporator.

The case of *Daugars v. Rivaz (g)*, which is the principal reliance of the other side, is put by the Master of the Rolls expressly on the ground of a trust, and can rest on no other ground. But there the pastor was of the essence of the corporation, quite as much as those who assumed to deal with him; and his interest in the revenue might well be regarded as in the nature of a

(a) 10 Beav. 402.

(b) 17 Q. B. 1.

(c) 15 Q. B. 518.

(d) 6 Q. B. 682.

(e) 9 Jur. 959.

(f) 10 Jur. 512, and 11 Jur. 421.

(g) 28 Beav. 283.

trust. The plaintiff's office, on the other hand, is not of the essence of the corporation, it is the creature of the trustees, who can abolish and revive it at pleasure, and can attach such salary to it as they think proper. It is admitted that where the same persons are visitors, and also have the management of the revenues, the Court of Chancery has jurisdiction to prevent a breach of trust.

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Attorney-General v. Daugars (a), *Attorney-General v. Bedford* (b), *Attorney-General v. Lubbock* (c), and the cases there collected, leave no doubt of this, if there could be any, but this is not a case of that kind. But it will be argued that the trustees here did not act *bond fide*, and that this gives jurisdiction. It is absurd to think of gentlemen occupying the position of these trustees being obnoxious to such an argument, and there is accordingly no proof of *mala fides*; but even if there were, the Court of Chancery cannot inquire into their motives, or subject them to nice scrutiny. If authority were wanted, the two cases of *Mr. Whiston* supply it. *Mr. Whiston* was dismissed because he had presumed to comment with freedom upon the conduct of the dean and chapter in the management of their trusts, and yet neither the Court of Chancery nor the Court of Queen's Bench gave him any relief. Where there is a trust, and the trustees have a discretion, motives are material, and the Court of Chancery will prevent them from acting corruptly, and that is all that is decided in *Dummer v. Chippenham* (d), and *Attorney-General v. Harrow* (e).

It is said that the plaintiff's office was for life; but it is not shewn that there is an office. The charter does not create it; the trustees have not created it; and they

(a) 10 Jur. N.S. 996.

(c) 1 C. P. Cooper, 84.

(b) 2 Ves. 505.

(d) 14 Ves. 245.

(e) 2 Ves. 552.

1866. could not, if they desired, give it a permanency beyond their control or that of their successors, for they are to determine the number and duties of the professors. To appoint a professor for life so that he became immoveable, whether he performed the duties or not, as it is said the professors in Edinburgh were before the recent acts of parliament, would clearly be in excess of their powers; would be *ultra vires*. This is rather the case of a general hiring, as to which the law is well settled. He was appointed without any formality, merely by resolution. He was not appointed under seal, and to entitle to a freehold office there must be a deed. In the English public school cases we have a trust, which we have not here.

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Argument. It is argued, but it cannot be seriously intended, that the tenure in Edinburgh must govern; but if that argument is of any value it proves too much. Dr. Cook proves that there a professor who was not a clergyman was irremovable, and those who were clergymen only through the church. The plaintiff has not pretended to claim such permanency as that; but there is not one word in the charter which gives the least countenance to the argument, and every consideration of expediency is against it. The trustees have all the usual and necessary powers of visitors, except where those are restricted in the charter, and there are none such as to leave any doubt of the power of the trustees to dismiss the plaintiff as they have done.

It is not made out in evidence that the tenure is for life, and it cannot be assumed or inferred. There is nothing in the nature of the office itself making it necessarily for life. In many of the famous seats of learning in the United Kingdom, professorships are held for short periods, or during the pleasure of the governors. It is so in University College, Victoria College, and McGill College, in this Province; besides, it cannot be supposed that at the very time the Imperial Government

was devising means to remove the intolerable grievance of irremovable professors in the University of Edinburgh, which was afterwards effected by an act of the legislature, the crown would have planted that same grievance in this colony by the charter of Queen's College. The appointment here cannot be anything more than an ordinary hiring, for want of a seal. This corporation, like others, acts through the common seal, and no office has been created nor appointment made through the common seal (a).

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The case of *Daugars v. Rivaz* is distinguishable in a number of points. *Whiston's* case was cited there, and its authority was not questioned. The Master of the Rolls did not mean to overrule it, but thought his decision could stand beside it; but the decree in this case and in *Whiston's* case cannot stand together.—*The King v. St. Catharine's Hall* (b), *The King v. Ely* (c), *Attorney-General v. Clare Hall* (d).

Argument.

The plaintiff must establish two things before he can maintain the decree: first, life tenure; and second, a trust; neither of which he has done, and the decree must be reversed.

Even if the decree be right in restoring the plaintiff to his professorship, it is erroneous in making the individual trustees pay the costs personally. There is no imputation upon their conduct. They acted for the best interests of the college, and acted throughout upon legal advice.—*Vez v. Emery* (e), *Angier v. Stannard* (f), *Devey v. Thornton* (g), *Field v. Id. Donoughmore* (h).

(a) Ventris, 855; Vin. Abr. Corp. G. 2 pl. 7; Yearbooks, 18 H. 8, fol. 12, Grant on Corporations, 58; 2 Ld. Raym. 1845.

(b) 4 T. R. 233.

(c) 2 T. R. 838.

(d) 3 Atk. 664.

(e) 5 Ves. 141.

(f) 8 M. & K. 556.

(g) 9 Hare, 282.

(h) 1 Dr. & W. 284.

1866. Mr. A. Crooks, Q. C., Mr. Blake, Q. C., and Mr. Cattanaoh, for the respondents.

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The appellants must shew the decree clearly wrong; *prima facie* it is right. Three of the judges of the Court of Chancery have agreed that the decree is right, and in a question of jurisdiction great weight must be attached to the opinions of the judges of that court, especially where they are unanimous. The appellants proceed entirely on the ground of want of jurisdiction, and it is the sole question we have to deal with.

[Mr. Strong.—The want of jurisdiction is one ground; but it is not admitted to be the only ground of appeal.]

Argument. It is clear the trustees cannot remove at their will and pleasure, and if they assume to do so the court will interfere. It can restrain them from proceeding *ultra vires*. Assuming that the court has jurisdiction, then the question becomes one of tenure. It is no question of contract. It is the case of an office. There is an office, and it is to be filled. The trustees merely nominate and appoint the incumbent. [The Chief Justice.—“Where do you found the office?”] In the charter, and in the law of the land. [The Chief Justice.—“The charter gives the power to create the office, does not create it.”] The charter treats the office of professor as incident to the university, and thus impliedly, if not expressly creates it. The several sections of the charter shew this. It was so in the old charter of King’s College. The trustees have so interpreted the charter themselves. They took it for granted that the office existed, and made the appointment; and as against the incumbent they are estopped from arguing that the office does not exist. The existence of the chair must be conceded, and the appointment is during good behaviour, for he may be removed for misbehaviour, but not otherwise (a). An officer cannot be removed

(a) See 2 Kyd on Corporations, 50.

without cause. There is no general power to remove, nor can they appoint during pleasure. Their power is limited to defining their number and duties, and no power of regulation of the tenure (*a*). Where express power is given to make by-laws the power is limited to this (*b*). The statute of Elizabeth makes coal mines taxable, and the inference drawn was that other mines were not taxable, "*expressio unius*," &c. "*Expressum facit cessare tacitum*." 1866.

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The circumstances under which the charter was granted may be looked at for its interpretation. The professorships in Scotland were during good behaviour, and it is obvious the life tenure was not considered, either by the university commissioners or the legislature, to be objectionable, for by the Act of 1858 it was provided, that when professors became incapable they should be obliged to retire on an allowance, thus expressly recognizing the life tenure of professorships. The supposed inconveniences of a life tenure, on which the other side lay so much stress, do not exist. Argument.

A professor is a public officer, and as such cannot be removed without trial.—*Gibson v. Ross* (*c*). The position and status of a professor is highly dignified, and is not to be compared to menial offices. It is so regarded in books of authority (*d*).—*Gibson v. Ross*, *Attorney-General v. Pearson* (*e*).

Assuming that the charter does not go far enough, it is too much to infer a power of removal. The existence of the power is not necessary, and if not, it is not to be implied. The trustees are not supreme. The *senatus academicus* have functions to perform by express provision of the charter. The plaintiff and other professors,

(*a*) 2 Kyd, 102. (*b*) Broom's Maxims, 581. (*c*) 7 Cl. & Fin. 241.

(*d*) 1 Kyd on Corporations, 87, 40; 2 Kyd, 69; Malden on Universities, 110, 117.

(*e*) 8 Mer. 358.

1866. being members of this body to that extent, derive their power and existence from the charter.—*Attorney-General v. Clifton* (a).
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The visitatorial jurisdiction is internal.—*Thompson v. University of London* (b), *Ex parte Buller* (c).

The visitor can only act with reference to matters within his jurisdiction. If he exceed his jurisdiction the Court of Chancery will restrain him.—*Dr. Bentley's* case. It is only in reference to a member of the domus that a visitor can act.—*Davidson's* case (d).

Persons exercising powers conferred by Acts of Parliament will be kept in proper bounds by the Court of Chancery, and will be prevented from exceeding their powers, and trustees and visitors will be kept to their duty in like manner.—*Tinkler v. Wandsworth* (e), *Ware v. Regent's Canal Co.* (f), *Willis v. Childe* (g) *Long v. Gray* (h).
 Argument.

The trustees here acted *mala fide*, even assuming that they had jurisdiction. They assumed to dismiss for cause, but the evidence shews a want of good faith.—*Dummer v. Chippenham* (i).

There is a trust in favor of the plaintiff, and that gives jurisdiction. The plaintiff is interested in the endowment, and is entitled to be paid so much of it as is annexed to his chair, and it is clear that whether the endowment is in gross or distinct, this is so; *Daugars v. Rivaz* establishes this.

Long v. Gray establishes the jurisdiction of the court

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| (a) 32 Beav. 596. | (b) 10 Jur. N.S. (1864) 669. |
| (c) 1 Jur. N.S. 709; 2 Kyd, 174, 267. | (d) 2 Kyd, 241. |
| (e) 2 DeG. & Jones, 264. | (f) 5 Jur. N. S. 25. |
| (g) 18 Beav. 117. | |
| (h) 9 Jur. N. S. 805; 1 Moore, P.C. N.S. 461. | |
| (i) 2 Kyd, 59; 2 Lord Raymond, 1240. 14 Ves. 245. | |

both on the ground of trust and proceeding illegally. 1866.
 Even if the ordinary salary did not constitute a trust within the meaning of a court of equity, these trustees have the administration of a specific fund in behalf of the plaintiff, namely, his allowance from the commutation fund; as to this sum, at least, they are trustees for him. The college was in effect commuted with as representing the clerical professors, and the court will see that the plaintiff is not illegally cut off from the benefits secured to him by that arrangement.

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The existence of a contract does not necessarily exclude jurisdiction. *Daugars v. Rivaz*, and numerous other cases, establish this.

The statutes under which the plaintiff was removed were not duly passed, and the court will set them aside. There was not a quorum present. There ought to have been thirteen members present, because the statutes affected the tenure of office. The by-laws cannot have an *ex post facto* operation (a).

Argument.

In short the office of classical professor exists, and so long as it exists the plaintiff is entitled to hold it during good behaviour, and the Court of Chancery has jurisdiction to restore him to his office on the double ground of there being a trust and the illegality of the proceeding.

After all, the existence of the office is not an issue in this case. The answer does not deny it, and the court is entitled to assume its existence. The charter did not contemplate any more formal creation of the office than the appointment of a principal. The principal and the professors are on the same footing. It is not expressly stated that they shall have power to make offices. If there be an office, the question arises, was there a sufficient appointment of the plaintiff? The charter says he may be elected. *Gibson v. Ross* contains an authorita-

(a) 2 Kyd, 112, 109, 122.

1866. tive exposition of the law. The clause which gives power to elect does not give power to remove, therefore the trustees have it not. The fifteenth clause limits and defines the power. The word *may* is not equivalent to *must*, as argued on the other side, but it is in contradistinction to *shall*. It would be unreasonable to construe this word to mean must. Whenever there is inquiry there must be proof. The only other reference to the subject is in clause twenty-five, and that means the inquiry and removal in clause fifteen. Unless this be so, the trustees have larger powers than the charter gives them, which is contrary to the true principle of the construction of charters.

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The principal and professors are put on the same footing in the charter. The principal is the head, and in the same position as the master of a public school. Could the crown mean that the principal, although the nominee of the Church of Scotland, should be dismissible at pleasure? It could not have meant that. The conclusion therefore is that, as soon as a person is appointed to one of the recognized chairs, he is to hold it until removed for cause. If the tenure is such as is contended for, it is not contended that this dismissal can be sustained as a dismissal for cause. All the plaintiff asks is a trial. The determination of the court is that he must be tried. Admit that it would be a calamity that a professor should be imposed on a college for ever, however unfit or incapable he might in the course of time become; we have not to deal with that case here, for a remedy is provided; there may be a removal for cause.

Argument.

The court has jurisdiction where trustees being visitors have not acted according to their powers. Suppose an undisputed life tenure and the visitors remove. It seems mockery to say they cannot be interfered with. Apply that to this case. Is that not an interference with something outside and beyond their powers alto-

gether. The question is not whether they have done right or wrong, but whether they have done what they had no power to do; whether they have acted *ultra vires*. The power not having been strictly pursued, the act is a nullity. What the plaintiff asks is to have it declared that the act is a nullity, and that notwithstanding it he is still professor, and so must be reinstated. The case is not distinguishable from *Daugars v. Rivaz*.

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There is no incompatibility in the existence of a power to abolish the chair, and the plaintiff having a freehold in the office. Freehold estates in land may be liable to determination on the occurrence of particular events, and why not this office? If the charter had expressly declared the tenure to be during good behaviour, and had given power to abolish the chair, that might well be—See page 438 of the case in *Moore*.

The trustees should personally pay the costs of the suit, and relieve the charity from the consequences of their improper and illegal acts. They should do this because they acted contrary to the opinion of counsel, and against the protest of the members, and against the opinion of members who were lawyers. The meeting was illegal, and they were made aware of it and warned. They were animated by feelings of personal hostility to the plaintiff.

Argument.

Mr. *Strong*, in reply.—The appropriate mode of appointing to an office is by grant, and as an estate in land will not pass without a grant, so no more will an office.

The trustees have the fullest power under the charter to deal with this office. They have power to make by-laws. In *Gibson v. Ross* that power was construed to mean power to regulate the office, and the plaintiff contracted with the trustees, knowing the ample power they had.

1866. The Court of Chancery by its decree has arrogated the province of a court of law, and assumed to set aside the by-laws of the college. It has clearly no jurisdiction to do this. It was never heard before that the Court of Chancery should quash by-laws.

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It has been argued that the principal and professors were on the same footing as regards their respective offices, and that if the one was removeable so was the other. But that argument is fallacious; the only inference logically to be drawn being that whereas the office of principal was created by the charter, the office of professor was not so, but was left entirely to the trustees.

Argument. Great importance has been attached to the case of *Gibson v. Ross*, the case of the Master of the Academy of Tain, in Scotland, decided in the House of Lords, as an authority in favour of the plaintiff; but it was cited in the court below, and we now rely upon it here as an authority which alone, and by itself, establishes the clear and undoubted right of the trustees of Queen's College to dismiss the plaintiff. In that case Lord *Cottenham* said that the Academy of Tain, though founded by royal charter, was a private corporation, though for a public purpose, and that the trustees had undoubted power to remove the master; that the master there was not like a public schoolmaster, who was a public officer, and could not be removed without cause. We contended in the court below that this college was in like manner a private corporation, though for an important public object, and that its resemblance in that respect to the Tain Academy was perfect. The learned Vice-Chancellor, however, determined differently, but we contend erroneously; all the authorities establish that such a corporation as this is private.—*Philips v. Bury* (a). In two American cases, *Allen v.*

(a) 2 T. R. 352; S.C. 1 Lord Raymond, 9; 2 Kent's Com. 274, 303; 2 Kyd, 195.

McKean (a), and *Dartmanth v. Woodward* (b), which were cases arising out of colleges established by royal charter, this question is discussed in a very exhaustive manner; and it is clear, beyond a doubt, that for all the purposes of this case, Tain Academy and Queen's College may be considered alike private corporations, established by royal charter, for objects more or less extensive and public, and governed by the private tribunal, the *forum domesticum* of the visitor, or the board of trustees, according to the law as authoritatively laid down by Lord *Cottenham* in the case of *Gibson v. Ross*.

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The argument of *ultra vires*, so strongly insisted on for the plaintiff, is entirely without foundation.—*Philips v. Bury*, *Whiston v. Rochester*, and *Regina v. Rochester*. In this last case the argument was distinctly made and overruled.

Argument.

The plaintiff's case cannot be sustained by the argument based on the commutation of the clergy reserves. The trustees are not trustees of this fund for the plaintiff in any sense. His salary was not increased on the occasion of the commutation, and it would be the same if it were entirely lost. When the plaintiff leaves the college he will continue to receive his allowance from the fund, provided he remains in the church, and he will receive it quite independently of the college.

The judgment of the court was delivered by

HAGARTY, J.*—I propose first to consider the question of jurisdiction.

The charter authorizes the trustees to appoint a

(a) 1 Sumner, 277.

(b) 4 Wheaton, 518, 681.

* SPRAGGE, V.C., was absent on account of illness when judgment was pronounced.

1866. principal, and such professors, masters and tutors, and such other officers as to them shall seem meet.—Sec. 12.

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As soon as there should be a principal and one professor, the trustees have authority to constitute the "College Senate" for the exercise of academic discipline, &c., and all the professors should be members thereof.—Sec. 29.

The trustees have power to make statutes and rules to regulate the number, residence and duties of the professors, and their salaries, stipends and emoluments, and the same to revoke, vary and alter. Whenever there should be a principal and four professors, the senate should have power to confer degrees in Arts and Faculties.—Sec. 19.

Judgment. The charter was granted in 1842, and in 1853 the then first principal, Dr. *Cook*, was directed by the trustees to proceed to Scotland and engage professors for the college; and the plaintiff was offered and accepted the professorship of Classical Literature, at a salary of £350 a year.

The endowment of the college consisted of gifts and subscriptions. No fund or property appears to have been provided from any public source. The crown did nothing beyond granting the charter. Annual collections are made for bursaries, and moneys and property by gift and bequest have been obtained from individuals. The Provincial Legislature has usually made an annual grant to this college, with several others. No particular fund is set apart or exists for the support of this chair of Classical Literature; the stipend seems to be paid from the general funds of the college.

It seems conceded that, to ground the jurisdiction of the court, there must be the position of trustees and *cestui que trust* between the defendants and the plain-

tiff; that there must be a trust in the sense in which that word is understood in courts of equity, to warrant its interference. 1866.

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The charter does not create the office held by plaintiff. His office is not of the essence of the corporation. The creation of a chair of Classical Literature was wholly the act of the trustees under their chartered powers; they were not bound to create it, and it was conceded in argument that they have the power to suppress it altogether. The corporation existed prior to its creation, and can exist after its suppression, exercising all its university functions.

From the vast mass of cases bearing more or less on the question, two or three may be selected. *Whiston v. The Dean and Chapter of Rochester* (a), decided by Sir James Wigram, in 1849, appears not to have been cited in the court below. The charter of Henry VIII. establishing the Cathedral Church, provided that there should be always a "*Præceptor puerorum in grammatica*." A stated salary was assigned to him from the church funds. The plaintiff was appointed master of the grammar school, in 1842, at a fixed salary, and in consequence of certain differences with the dean and chapter, was dismissed by them. He filed his bill to restrain them from removing him or appointing a successor, and after a very able argument by Sir J. Romilly for the plaintiff, and Roundell Palmer for the defendants, Sir James Wigram refused, with costs, a motion for injunction. He says: "I never entertained a doubt that if it could be established that the dean and chapter were trustees for the master of the grammar school, he would be entitled to the assistance of the court in enforcing the execution of the trust. If the appointment of plaintiff as schoolmaster gave him a right to the stipend prescribed by the statutes as a *cestui*

Judgment.

(a) 7 Hare, 532.

1866. *que trust*, as against his trustees, there is no question, whatever, that the mere circumstances of defendants being a corporation, or an ecclesiastical body, would not remove the case from the jurisdiction of the court."

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After an adjournment, to look into authorities, the learned judge says: "The answer that I feel compelled to give, after examining I believe every case that was cited in argument bearing upon it, is, that this is not a case of trust in the sense above explained, (referring to certain cases.) The master, upon the true construction of the statutes, ought to be considered only as an officer of the Cathedral Church, appointed for the purpose of performing one of the duties imposed on the church by the statutes of the founder. I cannot in this case, for the purposes of the question I have to determine, distinguish the position of the master from that of the master in *Attorney-General v. Magdalen College (a)*,
Judgment. or from the other cases in the books, in which similar questions have arisen between collegiate bodies and persons holding offices appointed by the founder, but which persons have not been members of the collegiate body. I cannot, upon the construction of the statutes in this case, say that the master is not one of the 'Ministri' spoken of. But if the contrary of this could be maintained, I cannot discover a ground for holding that the master is a *cestui que trust* of the Cathedral Church, only because he receives a stipend payable out of the common funds of defendants, which would not equally oblige me to hold that every officer to whom a living and a stipend are given is also a *cestui que trust*. The case of *Attorney-General v. Magdalen College* is a direct authority in point, and I am satisfied with following that authority. * * The only question I have to determine is, whether the Court of Chancery, in the exercise of its ordinary jurisdiction by bill, in a case in which no trust exists, can try the right to the office

(a) 10 Beav. 402.

of schoolmaster, from which the defendants have exercised the power of excluding him. I am of opinion this question must be answered in the negative. Excluding trust, I cannot find a single authority which supports the proposition."

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The plaintiff afterwards applied to the Queen's Bench (a), but failed there, because he had not appealed to the visitor named by the founder.

Sir *James Wigram* did not make this any ground of objection, he said, "Supposing the bishop to be the visitor, and that he has not interfered, I do not know why the court should not in a plain case declare the right of the plaintiff."

The Attorney-General v. Magdalen College was before Lord *Longdale*, Master of the Rolls. The statutes provided for the perpetual maintenance of a schoolmaster, with a named stipend, "out of the common goods of our college." Judgment.

The Master of the Rolls says: "If, on the true construction of the statutes, the schoolmaster and usher ought to be considered only as officers appointed and to be appointed by the college, for the purpose of performing the duty of the college in giving instruction to such persons as might attend them, *and the duty of appointing them is not otherwise annexed to the mere property of the college* than by the obligation to pay certain annual sums of money, and is not of the nature of a trust, the execution of which it is within the jurisdiction of this court to enforce, but the observance of which, according to the statutes of the founder, is to be regulated and enforced, and adequately provided for by the authority of the visitor; then this breach of duty, whatever it may be, ought to be redressed by the

1866. visitor, and not here. * * * The college has no doubt an important duty to perform with reference to the school, and the performance of that duty may be enforced by proper authority; but unless it be a duty founded on a trust which this court can execute, the performance of this duty is not to be enforced here. * * The revenues of the college belong to the college for its own use, subject, indeed, to the performance of all duties incumbent on the college to perform, but not subject to any trust to be executed in this court. * * Though there is sufficient proof of the duty and obligations, there is not, in my opinion, evidence of a trust, as the word trust is understood in this court."

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The Vice-Chancellor speaks of the plaintiff in this case as "not being a member of the collegiate body." I do not at present see that it would have affected his decision had the master of the school been by the

Judgment. statutes a member of the chapter.

In the case before us the plaintiff is certainly a member of the body corporate. The charter is curiously comprehensive. It declares that certain ministers and laymen named, "and all and every other such person or persons as now is, or are, or shall, or may at any time hereafter, be ministers of the Presbyterian Church of Canada, in connection with the Church of Scotland, or members of the said Presbyterian Church, in such connection, and in full communion with the said Presbyterian Church, shall be, and be called one body corporate and politic, &c., &c." The plaintiff is certainly one of the body corporate—he is also a member of the college senate—but he is outside the governing body of trustees, to whom the management of the property and revenues are alone intrusted.

All the cases cited seem distinguishable. In *Dummer v. The Corporation of Chippenham*, the defendants held rent charges for the support of a free school, and brought

ejection against the plaintiff, the master, they having dismissed him, as he said, corruptly on political grounds, and not the grounds assigned by them. He asked discovery from the corporators named individually, and a demurrer to his bill was overruled. Lord *Eldon* says: "Defendants are entrusted in their corporate capacity with the management of certain property, *clothed with a trust for the maintenance of a school-master*, and for this purpose I represent the case thus, that the corporation have the power of nominating the master and dismissing him at their will and pleasure. A corporation, as an individual, with such a power over an estate devoted to charitable purposes, would in this court be compelled to exercise that power, not according to the discretion of this court, but not corruptly. * * My opinion is that this is a case in which the court will call upon individuals to answer."

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Willis v. Child (a), also relied on, was the case of *Judgment* the Ludlow School: a schoolhouse was appropriated to and held by the plaintiff, and all had been settled years before under a scheme for the government of the charity, settled by a previous decree of the Court of Chancery, reported in 3 Mylne and Craig.

The case of *Phillip's Charity Ex parte Newman (b)*, before *Knight Bruce*, V. C., was a petition under the Romilly Act by the schoolmaster and others. It appeared that a scheme had been settled some years before by the court to regulate the Sutton Free School, and the schoolmaster, besides a fixed stipend, had, after certain deductions, *one-half of certain rents and profits*; after holding the office some time he was dismissed, and reinstated by an order of the court in 1839, in a case not apparently reported; after some years he was again dismissed, and again petitioned and was again reinstated, the dismissal being irregular.

(a) 18 Beav. 117.

(b) 9 Jur. 962.

1866. In the *Fremington School case Ex parte Ward* (a) a dwelling and schoolhouse had been devised to trustees, to permit and suffer the schoolmaster to occupy while holding the office, and take the issues and profits, and also certain rents of other premises were to be paid to the schoolmaster. The Vice-Chancellor held, that the master had "acquired upon his appointment a freehold, or an interest in the nature of a freehold, and the revenue belonging to it, whether legal or equitable it is not necessary to inquire. Of course I do not say he became an irremovable master. On the contrary, I assume the competency of the electors, or a majority of them, to remove him for a just cause. This power, however, they were, as I conceive, bound to exercise not otherwise than judicially."

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In the *Berkhampstead case* (b) also, the master was intitled to two-thirds of certain funds arising from rents under a previous scheme for the charity, arranged by decree of the court. Lord *Eldon* said: "If in the original instrument a trust is expressed as to the application of revenue, this court has jurisdiction to compel a due application."

So in the *Chipping Sodbury case* (c), before Lord *Lyndhurst*, the master had a schoolhouse and residence, and certain moneys had been contributed to provide a residence, and it was sought to eject him therefrom.

Where services are wholly in the nature of personal service, the court will not interfere to restrain the removal of an officer. The last case on this subject is *Muir v. Himalaya Tea Company* (d). *Wood*, V. C., says: "Assuming the construction of the deed most favorable to the plaintiff, that he was an irremovable agent on the terms of his taking the shares, still what

(a) 10 Jur. 512.

(c) 8 L. J. 18.

(b) 2 V. & B.

(d) 18 L. T. N. S. 589.

could the court do? It would not act on the contract in equity in favour of the plaintiff, as the duties of an agent were in the nature of personal service, and as such incapable of being enforced in equity, and so the court could not enforce the fulfilment of the agreement on the agent." 1866.
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The strongest case in favour of plaintiff, is that of *Daugars v. Rivaz (a)*, decided in 1860, by *Bomilly*, M.R., (who argued unsuccessfully for the plaintiff in *Whiston's (b)* case).

Daugars was pastor of the French Protestant Church in London, and being dismissed by defendants, the elders and deacons, sought to be restored. King *Edward VI.* had incorporated a church for foreign protestants, the corporation being a superintendent and four ministers. After some years, the Germans and French separated into different congregations. The charter did not provide for the government and distribution of the funds. The French church had two ministers, and was governed by a consistory of the two ministers and the elders and deacons. Judgment.

The Master of the Rolls says: "On examining the rules, it appears that two funds have been created, and now exist: one dedicated for the support of the poor, and the other for the maintenance of the ministry and other church matters, * * wholly apart from the charter of incorporation a fund exists for the support of the ministry of the church. * * It appears that the funds of the institution are under the control of the governing body, and the defendants have practically the power of withholding from plaintiff the emoluments assigned to and accepted by him. This constitutes a trust which they have to perform, and which they are bound to perform in favour of the person who fills the office of pastor;

(a) 181 Beav.

(b) 7 Hare.

1866. and assuming the plaintiff to be wrongly deposed, I am of opinion the relation of trustees and *cestui que trust* does exist between the elders and deacons and the pastor."

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It is to be noted, that the corporate body under King *Edward's* Charter, is not a party to the bill. The Master of the Rolls held this to be unnecessary; and indeed the case seems to be wholly treated as between individuals. The plaintiff, as pastor or minister, was one of the consistory of ministers, and elders, and deacons. His office may be said to be of the essence of the association; and the existence of the fund for the ministry and the other purposes, seems to be the ground of this assumption of the relation of trustee and *cestui que trust*.

The strong impression left on my mind is, that in all the cases in which a court of equity has interfered to
Judgment. restore an ejected officer, it has been on the ground that there was a right of some specific kind to moneys or lands appropriated to the office, as in the case of a school master to whom a revenue derived from a specific source, or a house, or rent charge, &c., was directly appropriated, and this, as distinguished from a mere claim to be paid a stipend or allowance taken from some general fund. In other words, when the applicant can point to any specific moneys, or any rents, or land, and say that money, rent, or house, was expressly set apart for me as holding this office, and was held by others for the holder of the office; thus the court finds the trust established, and assumes jurisdiction to prevent a wrongful disturbance of the officer. But when nothing but the right to receive a fixed stipend out of a common fund of an institution, applied to many various purposes, and especially for the performance of a duty not essential to the existence of the institution, there is nothing on which the court can properly fasten a trust.

I therefore think the plaintiff fails on this branch of the case.

Mr. *Lewin* (a) points out the distinctions thus: "With 1866.
the visitatorial powers the Court of Chancery has nothing
to do, (the office of visitor being to hear and determine
all differences of the members of the society among
themselves, and generally to superintend the internal
government of the body, and to see that all rules and
orders of the corporation are observed,) it is only as
respects the administration of the corporate property
that equity assumes to itself any right of interference."

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There is of course a marked distinction between the mere dismissal of one salaried officer and the appointment of another to succeed him, and a misappropriation of the trust funds. The latter case would, I presume, be always open to the jurisdiction of the court, and any person interested could invoke its aid. But it seems an abuse of terms to call the plaintiff's dismissal in this case an improper dealing with or perversion of the trust estates. He, in my opinion, to ground the jurisdiction, Judgment.  
must shew that as regards some portion of the fund he is *cestui que trust*, and the defendants trustees for him.

If there were a visitor named under the charter, it would seem that it would be his province to arrange such a difficulty as has occurred in this case, falling, as it seems, within the definition given above of the visitatorial power.

The jurisdiction and duty of the court, where there is a misappropriation of trust funds, is explained by the Master of the Rolls in the well known case of *Attorney-General v. St Cross Hospital* (b). There the funds had been actually perverted from their proper purpose. He says: "Where there is a clear and distinct trust this court administers and enforces it, as much where there is a visitor as where there is none. This is clear both in principle and authority. The visitor has a common

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(a) Page 365, 4th ed. 1861.

(b) 17 Beav. 266.

1866. law office, and common law duties to perform, and does not superintend the performance of the trust which belongs to the various officers, which he may take care to see are properly kept up and appointed.”

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No visitor is named here, and the further difficulty arises from the fact that the crown gave no endowment, although creating the corporation for the public purposes of a university.

In the ordinary case of a royal foundation, the Crown would be the visitor, and would, through the Lord Chancellor sitting in Camera, act as such, as Lord Eldon did in 1821, sitting for the king in the case of Queen's College (a), deciding what persons were duly elected as principal and fellows.

Judgment. Lord Hardwicke, in *Green v. Rutherford* (b), (a case frequently quoted), says: “The original of all such power is the property of donor, and the power every one has to dispose, direct and regulate his own property, like the case of patronage. If the charity is not vested in the persons who are to partake, but in trustees for their benefit, no visitor can arise by implication, but the trustees have that power,” and it was held that there being a subsequent gift of property under particular trust by a third person, not the founder, the visitor had not jurisdiction to interfere as to it.

Again, in *Attorney-General v. Dedham School* (c), the Master of the Rolls takes a similar view.

Sir James Wigram says, in *Whiston's* case: “Where there is no visitor, the Court of Queen's Bench may be the proper court to redress the wrong.”

On this branch of the case I am of opinion that if the

(a) Jacobs, l.

(b) 1 Vesey, Sr. 462.

(c) 23 Beav. 356.

alleged breach of trust were such as on the authority of the cases would be cognizable in equity, the existence of a visitor would not necessarily be a bar.

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I have met with no case like the present, in which a professor in a college, under such a charter as this, has sought for reinstatement. I see nothing in the voluminous statement of facts laid before us to induce us to make a precedent if there be none. As *Buller, J.*, says in *Rex v. Bishop of Ely (a)*: "I have never been inclined to assume a jurisdiction on any subject which I have not found to have been previously exercised by the court, particularly in questions between members of the colleges of the universities. In such cases my inclination is against the jurisdiction of the court, unless I am compelled by legal authorities to support it"

Unless the right of plaintiff to the intervention of the court were most clearly shewn, I think if the court have discretion to refuse interference, that this is preëminently a case in which the plaintiff should have been left to seek a compensation in damages, if wrongfully dismissed. It is of vital importance to such an institution that confidence and harmony should exist between the trustees and the professors: that an apparently irreparable breach has widened between them, is apparent on the facts before us.

The remarks of *Knight Bruce, V.C.*, in *Pickering and Bishop of Ely (b)*, are in point. The plaintiff held the ancient office of receiver-general of the diocese of Ely by grant from the bishop, binding on his successors, for life, with an annuity of £10 from the revenues, with diet for himself and forage for horses. A large portion of his fees were from drawing diocesan leases, &c. He filed his bill to restrain the bishop from taking away from him this conveyancing business. The Vice-Chan-

(a) 2 T. R. 337.

(b) 2 T. & C. C. C. 249.

1866. *Weir v. Mathieson.* cellor says: "Being of opinion that the alleged rights of the plaintiff in the breadth and length in which he claims to be protected in them, are of a nature neither usual or convenient, nor without hardship or pressure upon the bishop, I consider it more fit for a court of equity to leave the plaintiff to obtain redress by damages or otherwise in a court of law, than to exercise its peculiar jurisdiction by compelling the bishop specifically to submit to the practical exercise of such rights, if rights they be." He then notices the want of mutuality, and that if the bishop sued plaintiff in equity to compel a performance of his duties he would be refused relief. He says, on that and the other grounds he dismisses the bill.

The same judge comments approvingly on this case, in a case some years later, of *Johnston v. Shrewsbury Railway Co.* (a)

Judgment. A large number of the cases cited have been decided under stat. 52 Geo. III. ch. 101 (called Sir *S. Romilly's* Act), passed in 1812, the proceedings being avowedly under that statute.

It enacts, that "in every case of a breach of any trust or supposed breach of any trust, created for charitable purposes, or whenever the direction or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition to the Lord Chancellor, &c., stating such complaint and praying such relief as the nature of the case may require," &c. Such petition has to be verified in a particular manner, and shall be first allowed by the Attorney-General. An appeal is allowed to the House of Lords.

*The Berkhamstead case, the Fremington School*

case, and *Phillip's Charity, &c.*, were all expressly under this act. The *Ludlow* case (*Willis v. Child*) was under a special act, 9 & 10 Vic. ch. 18. Grammar schools are regulated by 3 & 4 Vic. ch. 77.

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This act may be regarded as affecting procedure, rather than jurisdiction, as we find cases in which the court decline disposing of large questions on petition under the act, but direct parties to proceed by information. (a)

It would not be right perhaps for this court to dismiss the plaintiff's bill for want of equity, without expressing an opinion on the nature of his appointment, and the right to dismiss him on the part of the trustees,

The late learned Vice-Chancellor *Esten*, in his short judgment on granting the interim injunction, considered that the plaintiff held his appointment during good behaviour, while the duties of his office were performed ; that his legal remedy was inadequate, and that he was entitled to the protection of the court.

Judgment.

After the evidence was taken before the learned Chancellor, at Kingston, he appears to have held that as the legal question had been determined by the Vice-Chancellor, he thinks he should hold the plaintiff entitled to a decree, although he doubted the jurisdiction of the court to interfere.

On the re-hearing the only reported judgment is that of my brother *Spragge*, who reviewed the authorities, and decided in favour of the existence of the jurisdiction, and for the full relief of the plaintiff, but without express reference to the question whether the case was such as called for its exercise.

As to the tenure of office the charter gives no express

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(a) 15 Sim. 262. Tudor's Char. Trusts, 148, 175.

1866. directions on this point, and Vice-Chancellor *Esten* says that "the trustees have power to appoint for life, or for a term of years, or during pleasure."

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Apart from any implication of law arising from the nature of plaintiff's office under the charter, we see nothing in the evidence of any contract for any engagement of plaintiff beyond a general hiring, which the law would probably hold to be a yearly hiring, determinable as such in the usual manner.

The charter gives full powers to the trustees to regulate the number, residence and duties of the professors, the management of the revenues and property of the college, and the stipends, &c., of the professors, officers, and servants thereof, and also from time to time to vary and alter their statutes.

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Section 15 enacts, that if any complaint respecting the conduct of the principal, or any professor, master, tutor, or other officer of the college, be made to the trustees, they may institute an inquiry, and in the event of any impropriety of conduct being duly proved, they shall admonish, suspend, or remove the person offending, as to them may seem good. (Sec. 16). Provided always, that the grounds of such admonition, reproof, suspension or removal, be recorded at length in the books.

Section 25 provides, that five trustees, lawfully convened, shall be a quorum for dispatch of business, except for the disposal and purchase of real estate, or for the choice or removal of the principal or professors, for any of which purposes there shall be a meeting of at least thirteen trustees.

If the effect of these clauses be to prevent the removal of a professor, except for impropriety of conduct, &c.,

the view of the late Vice-Chancellor, as to a power to appoint during pleasure, can hardly be sustained. 1866

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The sections, no doubt, allow such a complaint to be made, and an inquiry and a power of correction or removal; and it is further clearly provided, that a professor cannot be removed except at a meeting of at least thirteen trustees.

If the effect of the charter be, that the tenure of office of a professor is for life, subject to removal only for expressed impropriety of conduct, then it seems to me that the trustees could not lawfully appoint, during their own pleasure, as my brother *Spragge* points out at page 399 of his judgment (a).

The plaintiff, under the charter, is a member of the senate. As such, it may be argued that he is a corporate officer, and falls within the rule to be found in many books, that, as in *Grant* on Corporations, 34, "Where a charter gives power to appoint an officer, an appointment for life will be intended, unless it appears otherwise, either from other parts of the charter, or the nature of the office."—*Comyn's Digest*, Franchise F, 32.

Judgment.

It is not easy to find any direct authority as to the tenure of a professor. Is it an office in the sense used in many of the text writers? Is he a public officer in the same sense?

In a removal case, reported in 7 *East* 167, *Rex v. Merham*, the question was whether a person came within the statute 3 Wm. and Mary, ch. 11, as "holding a public office or charge." Lord *Ellenborough* says: "An office must be derived immediately or mediately from the crown, or be constituted by statute; and this is neither one nor the other, but merely arising out of a

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(a) See also *Darlington School* case, 6 Q. B. 682; and per Lord *Lyndhurst*, 8 *Law Journal*, 10.



1866. *Weir v. Mathieson.* contract with the parish, which the parish officers, with consent of parishioners, are by the statute enabled to make with any persons, for the maintenance and employment of the poor. The question might admit of a different consideration, if any distinction had been established between a *public office* and a *public charge*; but I can find no such distinction, either in any adjudged case, or in the sense of the statute." Again he says: "Perhaps the best criterion for determining whether this man were an officer, was to consider whether he were indictable for the negligent discharge of the duty which he engaged to discharge." *Lawrence, J.*, says: "This is clearly no office, but an employment arising out of a contract."

*Baggs'* case (*a*) is always cited on this subject of tenure; but it concerns the disfranchising of a freeman in a borough.

Judgment.

The *Darlington School* case (*b*) reviews many of the authorities. There the schoolmaster, under the charter, was removeable in the discretion of the governors. Chief Justice *Tindal* notices the plaintiff's contention that his appointment was during good behaviour; "so that he had in contemplation of law a freehold in his office. \* \* If he had, as in *Baggs'* case, a freehold in his freedom for his life, and with others in their politic capacity, an inheritance in the lands of the corporation; or if the office of schoolmaster resembled that of a parish clerk, as in *Gaskin's* case (*c*), the inference drawn from these cases would be correct. But, looking to the terms of Queen Elizabeth's Patent, we think the office in question is in its original creation determinable at the sound discretion of the governors, whenever such discretion is expressed; and that it is, in all its legal qualities and consequences, not a freehold, but an office *ad libitum* only."

(*a*) 11 Rep. 98.

(*b*) 6 Q. B. 682.

(*c*) 8 T. R. 209.

He subsequently declares that whatever tenure was created by the charter, the governors had no power to make by-laws altering it.

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As to corporate offices, it had long been asserted on *Bagge's* case "that there can be no power of amotion unless given by charter or prescription." Lord *Mansfield*, in *Rex v. Richardson (a)*, says: "We think that from the reason of the thing and from the nature of corporations, and for the sake of order and government, this power is incident as much as the power of making by-laws."

But the chief difficulty with us is, whether the office of the plaintiff is in itself of that public character which warrants the interference of either a court of law or equity, beyond the investigation of any claim for pecuniary damages from a wrongful dismissal.

Queen's College had no public endowment or foundation. It has a royal charter of incorporation—a power to grant degrees, but no right of visit or inquiry was reserved to the crown. Judgment.

The case cited of *Gibson v. Ross (b)*, in the House of Lords, expressly decides that the mere fact of being incorporated by charter, did not make the Tain Academy other than a private institution. The Lord Chancellor (*Cottenham*) says: "It has been decided that when individuals establish a school to be maintained from private funds, the regulations under which public schools are conducted are not to be deemed applicable to them. A public schoolmaster is a public officer, and as such he cannot be dismissed without an assigned and sufficient cause. But it is clear that in the case of a private trust this rule does not apply. \* \* Then arises another question, namely, one relating to the effect of an incor-

(a) 1 Bur. 539.

(b) 7 Cl. & F. 250.

1866. <sup>Weir</sup>  
v.  
Mathieson. poration. I asked, in the course of the argument, whether there was any line of distinction drawn between the case of a private establishment, the members of which had been incorporated, and a case in which no such incorporation had taken place, and I could not find that any such distinction had ever been adopted. If so, then I am sure that your lordships would not for the first time introduce a distinction; nothing could more disturb the arrangement of a private establishment than that a subordinate officer in it should be considered to have a fee in his office."

Again, "If the charter of incorporation impose any restrictions on them, they would by the acceptance of it be considered to enter into a contract with the crown to exercise their authority subject to these restrictions. \* \* It is clearly established that a private society would have the right to dismiss a master, and there is Judgment. no difference here between these parties and any other private society, except that these parties are incorporated.

Lord *Hardwicke* said, in *Attorney-General v. Place* (a), "The charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be, but it is the extensiveness which will constitute it a public one." This was a case merely on the construction of words of bequest in a will.

The subject is much discussed in 2 *Kent's Commentaries*, 276. He says: "a hospital founded by a private benefactor is, in point of law, a private corporation, though dedicated by its charter to general charity. A college founded and endowed in the same manner is a private charity, though from its general and beneficial objects it may acquire the character of a public institution.

\* \* Every charity which is extensive in its object may, in a certain sense, be called a public charity, nor will a mere act of incorporation change a charity from a private to a public one. \* \* A charity may be public though administered by a private corporation. \* \* The charity of almost every hospital and college is public, while the corporations are private. To hold a corporation to be public because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions since the time of Lord *Coke*." At page 298 the same author points out the distinction between "amotion" and "disfranchisement," the former applying to officers, the latter to members.

In the celebrated case of *Bowdoin College* (a), Mr. Justice *Story* elaborately reviews the law; noticing at large the equally famous *Dartmouth College* case (b), he says, "that Chancellor *Kent* has stated the law with his usual accuracy and clearness;" and adds, "that a college, merely because it receives a charter from government, though founded by private benefactors, is not thereby constituted a public corporation, controllable by the government, is clear beyond all doubt. So the law was understood by Lord *Holt* in his celebrated judgment in *Phillips v. Bury* (c).

He proceeds, "if we examine the charter of *Bowdoin College*, we shall find that it is a private, and not a public corporation. It answers the very description of a private college, as laid down by Chief Justice *Marshall*, in *Dartmouth College v. Woodward*. It is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the objects of that bounty. Its trustees were originally named by the founder, and invested with the

(a) *Allan v. McKean*, 1 Sum. 277.

(b) 4 Wheaton, 534.

(c) 2 T. R. 346.

1866. power of perpetuating themselves. They are not public officers, nor is it a civil institution, but a charity school or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creators."

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It is not expressly stated in the report, but it may be inferred, that *Bowdoin* College had university powers to grant degrees, as in one of the by-laws it speaks of "fees for any diploma or medical or academical degree."

*Dartmouth* College was, by royal charter, empowered to grant "any such degree, and degrees as are usually granted in either of the universities or any other college in Great Britain."

*Queen's* College is a very wide corporation, embracing all members and laymen of the Presbyterian Church in Canada in connection with the Church of Scotland, in full communion with said church, The government is vested in twenty-seven trustees, and all the congregations in the province admitted on the roll of the Synod may name one person, who shall be put on a list of names, from which, under certain restrictions, new trustees must be selected.

Judgment.

I am not prepared to hold that to this corporation we are not to apply the rules of law referred to as governing such institutions in the two American cases.

It rests wholly with the trustees to create the office of a professor, and such an office is not, as it seems to me, of the essence of the corporation. The latter could exist without it.

If the charter were silent as to provisions for the removal of a professor, I should at once hold that such an officer is removeable by the trustees, and his office or situation at once by their decision be vacant, subject to

any claims for salary in the usual way, if the engagement be of a yearly nature ; but not subject to any jurisdiction of either a court of law or equity to restore ; that the service would be of a peculiarly personal character, and damages for any proved breach of contract the only remedy.

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It is conceded that the trustees could abolish the chair of classical literature, and that its incumbent's rights would cease with it.


Mr. *Weir* could be "amoved" from the office of professor, although he could not, without cause, be "disfranchised" as a member of the corporation, according to Chancellor *Kent's* definitions. His dismissal from his situation still leaves him a member of the corporate body.

It seems also conceded that the trustees can alter and regulate the emoluments of any professor. Judgment.

This power is important to be considered. Unless the plaintiff can maintain his right to a legal interest or estate in the office and its emoluments, as they were at his induction—if he be always liable to any reduction in the discretion of the trustees, or to an optional abolition of the office by the same body, it seems more a matter of form than substance to urge his right to a restoration by legal process.

The office is not essential to the existence of the corporation, or to the discharge of its functions ; it exists at the discretion of the trustees, and its emoluments depend also on them.

It only remains to consider if the words of the charter restrict the right of removal, which (in the absence of such words) I think clearly exists.

1866. It seems apparent, I think, that any removal of a professor must be at a meeting of at least thirteen trustees (a).  
  
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The supplemental answer shews that this took place in May, 1865, after the bill filed.

But does section 15 declare the only manner and the only cause for which a professor can be removed? "If any complaint respecting the conduct of the principal, or any professor, master, tutor or other officer of the said college, be at any time made to the board of trustees, they may institute an inquiry, and in the event of any impropriety of conduct being duly proved, they shall admonish, reprove, suspend or remove the person offending, as to them may seem good; provided always, that the grounds of such admonition, reproof, suspension or removal, be recorded at length in the books of Judgment. the said board."

These sections do not seem to have been followed in the plaintiff's case. Is he still, therefore, *de jure*, professor of classical literature?

If a professor can only be removed in the manner prescribed by this section, the same rule must certainly apply to the other persons named, viz: "masters, tutors and other officers." All of whom would be equally irremovable except as therein provided. Sir *James Wigram*, in the case already cited, pointed out that if the master of the grammar school could make out the existence of a trust in his favor, the "Janitor," on being discharged, might equally come to court for restoration.

A master or tutor, casually employed, or any other of the many "officers" about a university, might, on

one construction of this section, be equally irremovable with the principal. 1866.

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Once granted that the office is one under the original charter, in the sense contended for by plaintiff, it seems to follow on the authorities that its holder takes it with all its original rights of tenure, and that even by agreement he cannot be reduced to a lesser interest.

We may give effect to the 15th and 16th sections by confining them to cases in which, on complaint made, the officer can be dismissed, leaving him no claim for legal damages thereby. This would be a dismissal for cause.

On the other hand, a dismissal such as took place in this case, at the May meeting, would be at the discretion of the trustees, and may leave them liable to an action for arrears of salary, in the absence of a notice terminating at the proper time, on the usual principle.

Judgment.

There seems no alternative between this construction and declaring that every professor, master, tutor, or other officer, holds his appointment irremovable, except for cause in strict pursuance of the 15th section.

The words used in the charter declare no distinction between the higher and the lower officers, and the rights urged by plaintiff must, if he succeed, be conceded to many below him in position.

I have already stated that I consider he fails to establish his rights merely as inherent to his holding of such an office under such a charter, and that his main dependence must be that any proceeding to oust him must be under those sections.

We should pause long before giving effect to plaintiff's argument, with all its inevitable consequences.

As Lord Cottenham said in *Gibson v. Ross* (a),

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(a) 7 Clk. & F. 250.



1866. "There are many cases in which it would be highly inexpedient for the interests of a body like these trustees, that a man should continue in his situation, though it might be difficult to shew a legal ground for his removal. He may be unsuccessful in the discharge of his duties: he may have great abilities, but yet be unable effectually to exert them in the instruction of his pupils. This might be great evil to an institution of this nature, and yet it might not amount to a cause which in a court of justice would justify the dismissal of the master. At the same time it must be admitted that the circumstances I have mentioned would form a good ground for desiring the master's dismissal."

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It is needless to enlarge this list of actual, though not perhaps legal disqualifications. An unstained moral character, high intellectual attainments, and unsparing activity in the discharge of duty, may, and often do, co-exist with unhappy forms of temper, restless irritability and morbid sensitiveness, or jealousy, which may utterly unfit their possessor for the useful discharge of the delicate duties of education, and the creation of respect and confidence amongst fellow-workers and pupils.

The court anxiously avoided all intermeddling with the merits or demerits of individuals in the unfortunate disputes that have resulted in this litigation.

It is sufficient to say that, wherever the blame rested, a state of things was disclosed most injurious to the best interests of Queen's College.

We are anxious to carry out the benevolent directions of the last section of the royal charter, which enjoins on courts of justice that its language "shall be construed and adjudged in the most favourable and beneficent sense for the best advantage of our said college."

I have bestowed much consideration on the argument of plaintiff as to his legal right as professor, and have at last (although not without some doubt), arrived at the conclusion that he was removeable by the trustees, at a

meeting where the statutable number of members was present, although not for cause under the 15th section. 1866.

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I think the appeal must be allowed—that the plaintiff's bill in the court below should be dismissed. I think the case against him, as to the want of jurisdiction in the court below, is reasonably clear; that his interest in his office is not such as he claims; and lastly, that the case disclosed is one in which neither a court of equity nor law should interfere, except on the very clearest and most conclusive pressure of authority and precedent.

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ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

GAMBLE V. THE GREAT WESTERN RAILWAY COMPANY.

*Railway Company—Liability for safe carriage of luggage.*

*Held*, Affirming the judgment of the court below, that the mere fact of a passenger, travelling in a railway carriage, retaining possession of a bag or other small article of luggage, did not, without some evidence of contract, express or implied to that effect, relieve the company from their liability as common carriers in case of loss. [MORRISON, J., dissenting.]

Appeal from the Court of Queen's Bench. The judgment appealed from is reported in the 24th volume, page 407 of the Reports of that court, where the facts of the case are clearly set forth.

From that judgment the defendants appealed on the grounds that the judgment of the court below was wrong, in not distinguishing the liability of carriers of passengers for hire, from the liability of common carriers of goods; that the liability imposed upon the defendants by the said judgment was that of insurers, which can only attach when the carrier has the entire custody of the goods; that, in order to create such a responsibility, a delivery to the carrier must be shewn, and this ingredient was wanting; nor can it be supported by the suggestion of a constructive delivery; there was no fact which is evidence of a *prima facie* delivery; and delivery cannot be established by conduct of an entirely

1876. negative or passive character ; and that the illustrations  
 ———  
 Gamble from the judgment of the learned judge who dissented  
 v. from the judgment of the court below, exemplified the  
 Great West'n reasons why the plaintiff cannot recover in the absence  
 Railway Co. of express delivery, or of evidence to shew a retention  
 by him of possession after having required the defendants  
 to take charge.

In support of the judgment the plaintiff submitted that there is no distinction in law between the liability of carriers of passengers having luggage with them, from the liability of common carriers of goods ; and that the plaintiff was entitled, under the contract, to be carried from Chatham to Toronto by the defendants, with his luggage ; and the travelling bag having been taken by the plaintiff into the passenger car of the defendants, there was a delivery to them, and they were liable for its loss.

Argument. Mr. *Irving*, Q. C., for the appeal.

In this case one material ingredient is wanting which appears to have existed in all the cases cited in the court below, namely, some delivery, actual or constructive ; or knowledge brought home to the party charged of the article lost being on the cars. Since the argument of this case, a report of the decision in the case of *LeConteur v. The London and South Western Railway Co.* (a), has reached this country, and it is submitted that the language of the learned Chief Justice (*Cockburn*) in disposing of that case shews that if the plaintiff had taken possession of the goods sued for in that case, the company would not have been held liable. Here the bag of the plaintiff was not delivered to the company's servants ; nor is it shewn that it was offered to them and that they declined to take charge of it.—*The Midland Railway Company v. Bromley* (b).

Mr. *J. Hillyard Cameron*, Q. C., and Mr. *G. D. Boulton*, contra.

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(a) 13 L. J. N. S. 325 ; S. C. 14 W. R. 80. (b) 17 C. B. 382.

There is a clear distinction between goods on or 1866.  
about the person of the passenger, for which the  
company would not be held liable, and personal pro- <sup>Gamble</sup>  
perty kept charge of by the passenger, for the safety of <sup>v.</sup>  
which the defendants here must be held responsible. <sup>Great West'n</sup>  
If the view the defendants contend for were upheld, all <sup>Railway Co.</sup>  
the principles of law applicable to common carriers  
would be upset.

After taking time to look into the authorities, the  
judgment of the court was delivered by

RICHARDS, C. J.—Since the judgment in this case  
was pronounced in the court below, the report of  
another case decided in England has reached this  
country, and the dicta of the judges therein stated  
confirm to the fullest extent the views set forth by the <sup>Judgment.</sup>  
majority of the judges in the court below, in giving  
their judgment in this cause. The difference existing  
in the mode of stowing the baggage of railway passen-  
gers in this country and in England ought not, in my  
judgment, to change the nature of the liability of the  
companies as common carriers.

Take the analogous case of an innkeeper: Suppose  
the guest delivered to the landlord a trunk, and only  
intending to remain for the night, took to his bed-room  
a carpet bag and small articles; if the bed-room were  
broken into and any of these smaller articles stolen, I  
doubt if the keeper of the hotel could properly discharge  
himself from his liability safely to keep these articles,  
merely because they were placed in the bed-room by  
the owner, when he had given the trunk specially  
to the host, and thereby indicated he had taken the  
other articles into his personal possession.

The principles laid down in the case last reported  
in the Court of Queen's Bench in England, seem  
to me broad enough for general application, and  
are adapted to the mode of travelling which obtains

1866. in this country as well as that which prevails in England. *Prima facie*, the carrier is liable; and if he is to be discharged from liability it must be by some contract, either express or implied. The managers of railways are generally astute enough to insert conditions in their tickets, and other contracts, to discharge themselves from liability, and until they in some emphatic manner inform the travelling public that their companies will not be responsible for baggage placed in the cars by passengers, it will not be inferred that travellers have discharged them from the common law liability to carry it safely.

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I transcribe portions of the observations of the judges in *LeConteur v. The London and South Western Railway Co.*, the case to which allusion has been made, as reported in the Law Reports, Common Law, vol. i., page 54; though the case was not decided on the point now in dispute in this cause, yet the views of the learned judges are so clearly expressed, and they declare the law of the subject so plainly, and being in harmony with the other decided cases referred to in the court below, I think we may safely rely on them as indicating the judgment we ought to give in this matter.

*Cockburn, C. J.*, said; "When the case was first opened, I had imagined that the facts were such as to lead to the necessary inference that the plaintiff had taken possession of the chronometer, (being the article for the loss of which the action was brought), withdrawing it from the custody of the Company, and keeping it in his own personal custody and charge; but I think my first impression was incorrect. I think it appears that what took place was this: that by the desire of the plaintiff, the porter of the company placed this article in a carriage, in which a particular seat was to be appropriated to the use of the plaintiff. I am very far from saying, that there may not in these cases sometimes be a state of circumstances in which a passenger, who has baggage, which by the terms of the contract the company

are bound to convey to the place of his destination along with him, may not release the company from their obligation as carriers for the safe custody of the article, by taking it into his own personal custody and charge ; but I think the circumstances must be strong to relieve the company from their liability ; it is not because the article, that is part of the passenger's baggage to be conveyed with him is, by the joint consent of the passenger and the company, placed in a carriage with him that the company are necessarily released from their obligation to carry safely. Nothing could be more inconvenient than that the practice of placing small articles, which it is convenient to the passenger to have with him in the carriage in which he is about to ride, should be discontinued, and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safely carrying such articles, it would follow that no one who has occasion to leave the carriage temporarily would be able to have them with him with any degree of safety. I cannot think therefore we ought to come to any conclusion, which would relieve the company, under such circumstances, from the obligation, as carriers, to carry the baggage safely, which for general convenience ought certainly to attach to them. I cannot help thinking therefore we ought to require very special circumstances indeed, and circumstances leading irresistibly to the conclusion that the passenger takes such control and charge of his baggage, as to altogether give up all hold upon the company, before we can say that the company, as common carriers, would not be liable in the event of the loss."

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*Lush J.*, said ; " The first question is, whether the chronometer was delivered to and accepted by the company as carriers ; the contract was to carry the passenger with his ordinary baggage, and the case states on arriving at the station at Southampton, the passenger took his chronometer in his hand, gave it to the porter of the defendants, and the porter then in his presence placed

1866. it upon the seat. The passenger went away for some purpose; while he was gone the chronometer was stolen. The porter was there for the purpose of assisting the passenger in removing his luggage, which the railway company had contracted to carry. The railway company might have said: 'Whilst carrying this upon the seat of the carriage it is not safe, we will put it where we think it more safe.' We know it is the every day practice for passengers to carry, with the consent of the company, carpet bags, books, and cloaks, and things they want upon the journey, in the carriage with them. It cannot be said the things are not in the custody of the company as carriers, because they agree, at the passengers' request, to place them in the carriage where he sits. There is no fact to shew that this passenger, who was entitled to have his luggage carried by the defendants with the ordinary liability of carriers, took it out of their custody or relieved them from that obligation."

Judgment.

We are of opinion that this appeal must be dismissed with costs, and the judgment of the court below affirmed.

MORRISON, J., retained the opinion expressed by him in the court below.

A. WILSON, J., concurred in dismissing the appeal, at the same time expressing a doubt whether, if the facts had been more fully brought out, they might not have led to a different result; but as the facts were shewn he did not see that any other result could be arrived at than an affirmation of the judgment appealed from.

*Per Curriam.*—Appeal dismissed with costs.

[MORRISON, J., dissenting.]

[*Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chancellor,\* the Hon. Chief Justice Richards, the Hon. V. C. Spragge, the Hon. Mr. Justice Hagarty, the Hon. Mr. Justice Morrison, the Hon. Mr. Justice A. Wilson, and the Hon. V. C. Mowat.*] 1866.

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

HODGINS V. THE CORPORATION OF THE UNITED  
COUNTIES OF HURON AND BRUCE.

*Corporation—Notice of action.*

*Held per Curiam*—[RICHARDS, C. J., A. WILSON, J., and MOWAT, V. C., dissenting]—that a municipal corporation is not entitled (like a public officer) to a month's notice before action brought against the municipality in respect of any act of the corporation: nor is a party aggrieved by such act bound to commence his action within six months from the committing of the act complained of.

The plaintiff sued in the court below for an injury Statement. which he alleged the defendants had done him in the formation of a road and in cutting drains, by causing water to flow upon his land.

The defendants pleaded the general issue by statute.

The jury gave a verdict for the plaintiff, and awarded him \$100 damages.

Counsel for the defendants' afterwards moved for a rule, calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered pursuant to leave reserved at the trial, on the ground that no notice of action had been given to the defendants before the commencement of the suit: or why a new trial should not be ordered, because the verdict was against law and evidence, in this, that no notice of action

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\*Was absent from the province on leave when judgment was given.



1866. was given, and that the action was not commenced within six months next after the act was committed; and also because of the misdirection of the learned judge in overruling the objection to the plaintiff's recovery, that the action had not been commenced within six months next after the act had been committed.

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The court refused the rule; the defendants appealed for this refusal of the rule:

1. Because the defendants were entitled to such notice of action, and none had been given; and,

2. Because the action was not commenced within six months next after the act complained of was committed.

The appeal came on to be argued at the sittings of this court in March, 1865.

Mr. *S. Richards*, Q. C., for the appellants (the defendants below).

Argument.

There is a conflict of opinion between the Queen's Bench and the Common Pleas as to the necessity of notice to a municipal corporation in such a case as the present. The Queen's Bench holding that the corporation is not entitled to notice because the statute, ch. 126, of the Consolidated Statutes for Upper Canada, requires that the notice shall be served on 'the *person*, or left at his *place of abode*; and no such service can be made on a corporation aggregate, as it cannot be personally served, and as it has no place of abode. And the Common Pleas holding that the statute does, with the aid of the Interpretation Act, U. C., ch. 2, sec. 12, apply to corporations as persons—that they may perform a *public duty*—and as it is conceded their officers and servants, while carrying out the corporation directions, are entitled to notice, that the corporation must equally be entitled to notice as those whom they employ.

The cases in the Queen's Bench are: *Brown v. The Township of Sarnia* (a), *Snook v. The Town of Brantford* (b), *McKenzie v. The City of Kingston* (c), *McGrath v. The Township of Brock* (d). And those in the Common Pleas are: *Croft v. The Town of Peterborough* (e), *Reid v. The City of Hamilton* (f), *Barclay v. The Township of Darlington* (g), *Allen v. The City of Toronto* (h).

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A corporation may have a place of abode, which is presumed to be its place of business, as in the direction of the process of summons in commencing action—C. L. P. Act, sec. 1. *Mason v. The Birkenhead Improvement Commissioners* (i); and corporations are held responsible in a variety of actions, which treat them as persons; they are liable for slander, for assault and battery.—*Addison* on torts, 714, 762; *Stevens v. The Midland Counties R. Co.* (j), *Whitfield v. The South Eastern R. Co.* (k), *Denton v. The Great Northern R. Co.* (l).

Argument.

Mr. C. Robinson, Q. C., contra.

The reasons are given in *Snook v. The Town of Brantford*, before cited, why chapter 126 does not apply to municipal corporations, and he could add nothing further; there was a direct conflict on the point between the two courts, and all the cases bearing upon the question had been already cited.

The six months here were no bar, for there was a case of continuing damage, and cannot therefore be

- (a) 11 U. C. Q. B. 215
- (c) 18 U. C. Q. B. 634.
- (e) 5 U. C. C. P. 141.
- (g) *Ib.*, 432.
- (i) 6 H. & N. 72.
- (k) 1 E. B. & E. 115.

- (b) 13 U. C. Q. B. 621.
- (d) *Ib.*, 629.
- (f) 5 U. C. C. P. 269.
- (h) 6 U. C. C. P. 334.
- (j) 10 Exch. 352.
- (l) 5 E. & B. 860.

1866. governed by such a case as *Turner v. The Town of*  
*Brantford (a)*.  
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 Bruce.

DRAPER, C. J.—The 14th & 15th Victoria, chapter 54, annulled all previous enactments, giving certain privileges and protection to justices of the peace, and other officers or persons fulfilling any public duty and acting *bond fide* in the execution thereof, and it put all such privileges and protections as to notice of action, limitation of time for bringing such action, costs, pleading the general issue and giving the special matter in evidence, venue, tendering amends, and payment of money into court, upon a uniform footing.

The 16th Victoria, chapter 180, (passed the 14th of June, 1853,) by section 15, which is not very accurately penned, repealed, so far as regarded Upper Canada, so much of the 14th & 15th Victoria, chapter 54, in respect to actions against justices of the peace, together with  
 Judgment. all other acts, or parts of acts, inconsistent with the 16th Victoria, except as to statutes by such previous acts repealed. The 14th & 15th Victoria had, however, repealed all preceding statutes on that subject.

But though the 14th & 15th Victoria was repealed only as to justices, the 16th section of 16 Victoria, chapter 180, enacts that the last act shall apply for the protection of all persons for anything done in the *execution of their office*, in all cases in which by the provisions of any act or acts, the several statutes or parts of statutes by this act repealed, would, but for such repeal, have been applicable.

The last act, and the Consolidated Statutes of Upper Canada, chapter 126, superseding it, enact, that every action to be brought against a justice for any act done in the execution of his duty, with respect to a matter

within his jurisdiction, shall be an action on the case as for a tort, and it must be expressly averred in the declaration, and proved at the trial, that the act was done maliciously, and without reasonable or probable cause.—(Section 1.)

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But, for an act done by such justice in which the law gives him no jurisdiction, or in which he has exceeded his jurisdiction, or for any act done under any conviction or order made, or warrant issued by such justice, an action may be maintained by the person injured against such justice, just as before the act was passed—(Section 2); but no action shall be brought for anything done under such conviction or order until it has been quashed, nor for anything done under a warrant issued by such justice to procure the appearance of the party, and which has been followed by a conviction or order in the same matter until such conviction or order has been quashed—(Section 3); nor for any act done, if such last mentioned warrant has not been followed by a conviction or order, or if the warrant be to compel appearance; if a summons to appear were previously served but not obeyed—(Section 4). The 5th, 6th, and 7th sections apply exclusively to justices. The 8th gives power to a judge of the court in which an action is brought, where the act declares no action shall be brought, to set aside the proceedings. This must allude to the actions prohibited in the 3rd, 4th, 5th and 7th sections; actions either against justices of the peace or against persons acting under a conviction or order made by a justice. Then the limitation of time, the notice of action, the venue, pleading the general issue, and giving the special matter in evidence, are all provided for; although, as expressed, in favor of justices only; but the 20th section extends the application for the protection of every officer and person fulfilling any public duty. It may be doubted whether the 12th section was intended to apply to any others than justices; I think it was not, for it cannot be said to be applicable within the meaning of section 20.

Judgment.

1866. On comparing the first and last section an obvious difference presents itself. The cases for the application of the first section are plainly defined by the statute; whether any party not being a justice can claim the protection and privilege accorded by the last is a matter of judicial interpretation. All the privileges given by the act belong to justices; but, excepting those in the first section, the question as to whether the remaining privileges created by subsequent sections are applicable to others than justices is left to be determined by the courts, for they are given to such others only "so far as applicable." It has been held that they are not applicable to sheriffs, though they are public officers, when sued for acts done in the execution of their duty.

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The language of this act, without other aid, never could be held to include corporations. This result is deduced from the interpretation acts. The first of these applicable to the statutes, passed since the union, is 12 Victoria, chapter 10, which recited that it was desirable to avoid, by the establishment of some general rules for the interpretation of our acts, the repetition of *words, phrases and clauses*, which are rendered necessary only by the want of such rules, and enacted that such provision should apply to all future acts, except so far as it shall be inconsistent with the context; and (section 5, 8thly,) that the word "person" should include any body corporate or politic, or party, and the heirs, executors, administrators, or other legal representatives of such person to whom the context can apply. Then chapter 2 of the Consolidated Statutes of Upper Canada was passed "to prevent the unnecessary multiplication of words, and to give definite meaning to certain words and expressions which may be provided for by a general law. This act is in force in Upper Canada only. Section 10 enacts, that the word person shall include any body corporate or politic, or party, and the heirs, executors, administrators, or other legal representatives of such person to whom the context

applies. Section 19 provides, that the provisions contained in the Interpretation Act of Canada, and not contained in this act, shall apply to the Consolidated Statutes of Upper Canada as if incorporated therein. Reading these two interpretation acts together, and referring to section 3 of the Interpretation Act of Canada, as well as to the statute 12 Victoria, chapter 10, I presume that the following words, which begin section 2 of the Upper Canada Interpretation Act, "unless otherwise declared or indicated by the context," apply to all the sections following down to and including section 17. Such is the form and effect of the statute 12 Victoria, and also of the Interpretation Act of Canada. All these acts are so plainly *in pari materia*, that I feel warranted in so far construing the one by the aid of the other. Indeed I cannot suggest a reason why the same form of enactment was not followed for both.

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The question then is, whether the word "person," used in chapter 126, Consolidated Statutes of Upper Canada, is to be held to include the various corporations, municipal and other, in Upper Canada; in other words, whether the protection given by chapter 126 to justices of the peace and other officers and persons fulfilling any public duty, extends to corporations. Judgment.

The appellants are a municipal corporation, and are prosecuted in this suit because, as the plaintiff alleges, and the jury must be taken to have found, the defendants duly assumed a highway running between two townships in the county of Huron, which made it their duty to cause that highway to be planked, gravelled, or macadamized; and that, in constructing a gravel road on this highway, they, for the purpose of drainage, cut a drain and led the water through a new culvert, stopping up an old one, and thereby wrongfully caused the water collected in the drain to flow on to the plaintiff's land. This work was completed in 1858,

1866. since when, in times of freshet, the water overflowed the plaintiff's land from year to year. In 1862 this action was brought. I do not connect this injury with any illegality in the by-law, assuming the highway as a county road, none is suggested or complained of, nor does it appear that any ground existed for quashing the by-law. The 202nd and 203rd sections of the Municipal Act will not therefore apply; and if the defendants are entitled to notice of action, and that the action be brought within six months after the act committed, it must be by virtue of the extension of the provisions of chapter 126 to them. It is to be remembered that the question, whether by force of the interpretation acts the word "person" includes a municipal corporation, is not limited to a case where the act done is illegal and yet was authorized by a by-law which is also illegal; but extends to all cases where the act producing injury to another party, is nevertheless within the scope of the authority given to, or duties imposed upon, municipal corporations by statute. If chapter 126 applies to this case, it must also apply to the case of an act done under an illegal by-law, and then the argument of *Burns, J.*, in *Snook v. The Town Council of Brantford (a)*, applies, and with increased force, since long after the Interpretation Act of 12 Victoria, and after the two superior courts of common law had given opposite judgments upon this question, the legislature passed the Municipal Corporation Act of 1858, which contains the same provisions as the preceding act upon which that argument was founded, and which, by renewing the special protection as to acts done under illegal by-laws, tends strongly to negative the conclusion that the legislature had given or were giving a more general protection to municipal corporations under the acts for the protection of magistrates.

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Judgment.

It is unnecessary to repeat or review the conflicting

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(a) 13 U. C. Q. B. 626.

decisions in the two superior courts, which were cited on the argument. They were all decided on the application of the 14th & 15th Victoria, chapter 54. No reference was then made to any provision of the 16th Victoria, chapter 180, as affecting the point in dispute. I presume because the statute 14 & 15 Victoria was in terms repealed by the 16th Victoria only so far as related to justices of the peace, though the 16th section of the last act provided that the act should apply for the protection of all persons for anything done in the execution of their office. It may possibly have been thought that these words prevented the 16th Victoria from applying to corporations, as the "context" would exclude the interpretation "corporations" being given to the words, all persons for anything done in the execution of their office. In *Reed v. The Corporation of Hamilton*, Macaulay, C.J., makes a passing reference, but without any special remark, to the statute 16th Victoria.

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But as the Interpretation Acts declare that the word "persons" includes corporations, the Consolidated Statutes, chapter 126, must include them also, unless we find that the context and obvious intent of that statute, excludes them, or at least excludes municipal corporations from its purview. The language used in every section, except the first and last, would seem to point to justices of the peace only; and the first section, in defining the other officers and persons included in the protection thereby given, uses language to which forced construction must be given to make it apply to corporations; while the last only extends the privileges and protection not conferred by the first section to the officers and persons mentioned therein, "so far as applicable." If this act does apply to corporations, the first section, which expressly mentions all "persons," must be held to include them; it would have done so had the last section not been part of the act, and as a consequence, every action brought against a municipal corporation for anything done in the performance of its



1866. duties and, as is argued in the present case, in the execution of its power, must be an action on the case for a tort, and the declaration must allege that the act complained of was done maliciously, and without reasonable or probable cause, and on the general issue this allegation must be proved.

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To my apprehension, it is clear that the legislature never contemplated the general application of this section to municipal corporations; and I am equally convinced, that no part of this act ought to be construed as applying to other than natural persons and individuals holding station or office, to which certain public duties are attached; the execution of which, in their official capacity, might expose them to actions.

I agree in the reasons given in the judgments of the Court of Queen's Bench for their construction of the word "persons" in cases like the present, and I cannot but feel, that no small part of the reasoning of the then learned Chief Justice of the Common Pleas in contesting the argument of *Burns, J.*, above referred to, is weakened, if not wholly displaced, by the subsequent action of the legislature.

Judgment.

I am of opinion this appeal should be dismissed with costs.

RICHARDS, C. J., said he was unable to concur in the views just expressed by the learned Chief Justice. The point involved had been frequently discussed by him with the late Sir *James Macaulay*, and nothing that had since occurred had created any doubt in his mind as to the soundness of the opinions expressed by the judges in the Court of Common Pleas. It was unnecessary for him to say more than that he concurred in the views which were enunciated by Mr. Justice *Adam Wilson* in the judgment which he had prepared on the present occasion.

A. WILSON, J.—The statutes to be considered are 1866.  
the following: Chapter 126,\* section 1—Every action brought against any justice of the peace, for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, or against any other officer or person fulfilling any public duty, for anything by him done in the performance of such public duty, whether any of such duties arise out of the common law or be imposed by act of parliament, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged, that such act was done maliciously and without reasonable and probable cause; and if at the trial of any such action upon the general issue pleaded, the plaintiff fails to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant.

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Section 9—No action shall be brought against any justice of the peace [see section 20, extending this and the other sections to every officer and person mentioned in the first section,] for anything done in the execution of his office, unless the same be commenced within six months next after the act complained of was committed.

Judgment.

Section 10—No such action shall be commenced against any justice of the peace until one month at least after a notice in writing of the intended action has been delivered to him, or left for him at his usual place of abode by the party intending to commence the action, &c.

Section 11—Provides for the venue and pleading the general issue.

Section 12—Provides that the action shall not be brought in any county or division court against a justice of the peace, for anything done by him in the execution of his office, if he object thereto and give a written notice of his objection.

**1866.** **Section 13**—Provides, that after notice given, and before an action has been commenced, the justice may tender amends for the injury complained of, or after action he may pay the same into court.

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**Brace.**

**Section 14**—Provides, that if the jury think the plaintiff is not entitled to greater damages than have been tendered or paid, they shall find a verdict for the defendant.

**Section 15**—Provides, that the plaintiff, if he accept of the money paid into court in full, shall be entitled to his costs.

**Section 16**—Provides, that if at the trial the plaintiff do not prove:—1. That the action was brought within the time limited. 2. That the notice was given one month before the action was commenced. 3. The cause of action stated in the notice. 4. That the cause of action arose where the venue is laid. 5. When the suit is brought in a county or division court, that the cause of action arose within the county for which the court is holden, then the plaintiff shall be nonsuit, or the jury shall find for the defendant.

**Judgment.**

**Section 19**—If in any such case it be stated in the declaration that the act complained of was done maliciously, and without reasonable and probable cause, the plaintiff, if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled to his full costs of suit.

**Section 20**—So far as applicable, the whole of this act shall apply for the protection of every officer and person mentioned in the first section hereof, for anything done in the execution of his office as therein expressed.

**The Upper Canada Consolidated Statutes, chapter 2,**

section 12, provides the word "person" shall include any body corporate or politic. 1866.

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Chapter 22, section 17, provides, that every writ issued against a corporation aggregate, and in the absence of its appearance by attorney, all papers and proceedings in the action before final judgment may be served on the mayor, warden, reeve, president, \* \* \* or agent of such corporation, or of any branch or agency thereof in Upper Canada; and every person who within Upper Canada transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without the limits of Upper Canada, shall, for the purpose of being served with a writ of summons issued against such corporation, be deemed the agent thereof.

The Municipal Act, section 202, provides, in case a by-law, order or resolution be illegal in whole or in part, \* \* \* no action shall be brought until one month Judgment. has elapsed after the by-law, &c., has been quashed or repealed, nor until one month's notice in writing of the intention to bring such action has been given to the corporation; and every such action shall be brought against the corporation alone, and not against any person acting under the by-law, order, or resolution; and, section 337 provides, that proceedings taken against corporations for non-repair of roads, or for damages sustained by reason of their non-repair, shall be commenced within three months after the damages have been sustained.

The reasons which have been assigned by the Queen's Bench why a municipal corporation is not entitled to notice of action are:

1. Because it would be inconsistent with the intent and object of the legislature, as expressed in the preamble [of the act 14 & 15 Victoria, chapter 54, now chapter 126 of the Consolidated Statutes of Upper

1866. Canada,] which was to alter, amend, and reduce into one act the various acts, whereby certain protections and privileges were afforded to magistrates and others which were not of a uniform character.—*Brown v. Sarnia* (a).  
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2. The context of the act shews that the statute only applies to individual persons (b).

a. The two modes of serving the notice, *personally* or by leaving it *at the usual place of abode*, are altogether inapplicable to municipal corporations (c).

b. The service of a notice of action is not within the meaning of the act, which provides for serving the head of the corporation with "writs and process, and other papers and proceedings before final judgment" (d).

(e) Personal service upon a corporation cannot be interpreted to mean upon the head of the corporation, this would be service only upon a part of the corporation.  
 Judgment.

3. The 14 & 15 Victoria, chapter 54, did not apply to any of the then municipal acts, 12 Victoria, chapter 81, 13 & 14 Victoria, chapter 64, 14 & 15 Victoria, chapter 109, or 16 Victoria, chapter 181, because it had reference only to "so much of any act now in force as confers any privilege," as to notice or limitation of action, or amount of costs, or pleading the general issue, and giving the special matter in evidence, or venue, or tender of amends, or payment of money into court; while none of these municipal acts gave the municipality any privilege as to notice or limitation of action, or as to amount of costs, &c.—*Snook v. Brantford* (e).

4. Because none of these municipal acts fall within

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(a) 11 U. C. Q. B. 218.

(b) 11 U. C. Q. B. 219.

(c) *Ibid.* 219.

(d) *Ibid.*

(e) 13 U. C. Q. B. 623.

the description contained in the preamble to the 14th & 15th Victoria, chapter 54, viz., "acts of parliament in force in Canada, both public, local and personal, whereby certain protections and privileges are afforded to magistrates and others" (a).

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5. Because none of these acts "are altered or amended" by this statute.

6. Because, apart from the Interpretation Act, the language of the 14 & 15 Victoria, chapter 54, shewed the legislature had not municipal corporations in view when they passed it; all the language was applicable strictly to the personal acts of an individual, and cannot be applied to a corporate body without a strained and unnatural construction (b).

7. Because the word "person" in the Interpretation Act is not to be extended to corporations, if it be inconsistent with the intent and object of the act, or with the context; and the object and intent of the act and the context shew it was not intended to apply the word "person" to municipal corporations (c).

Judgment.

8. Because if the 14 & 15 Victoria, chapter 54, be extended to municipal corporations, it might happen that a party would have little more than a week within which he could bring his suit, for by 12 Victoria, chapter 81, section 155, no action for anything done under a by-law can be brought until the expiration of one month after the by-law has been quashed; one month's notice of action has then to be given, and the action must be brought within six months by the 14 & 15 Victoria, chapter 54 (d).

9. Because the 13 & 14 Victoria, chapter 15, limiting

(a) 18 U. C. Q. B. 624.

(b) 18 U. C. Q. B. 624.

(c) *Ibid.* 625.

(d) *Ibid.* 626.

1866. the time of bringing this action to three months, would have the effect of depriving a party of all remedy if he had to wait until the bylaw was quashed before bringing his action, or the time mentioned in the act must be assumed to have been altered by the 14th & 15th Victoria, chapter 54, "a conclusion which [the learned judge said] I am not prepared to adopt" (a).

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10. Because the three months' limitation in the 13 & 14 Victoria, chapter 15, would be reduced to two months if the 14 & 15 Victoria, chapter 54, be held to apply to corporations (b), or the time therein mentioned must be held to be extended to six months (c).

11. Because after the passing of the Interpretation Act, and the act of 14 & 15 Victoria, chapter 54, the legislature "has used the same language as to corporations being entitled to plead the general issue and give the special matter in evidence, as had been used previously without any provision for notice of action to be served," as in the Bytown and Prescott Railway Act, 13 & 14 Victoria, chapter 132, section 50, and in the 16 Victoria, chapter 190, section 53, as to road companies.

Judgment.

The reasons which have been assigned by the Common Pleas why a municipal corporation is entitled to notice of action are :

1. That municipal corporations are fully within the spirit of the 14 & 15 Victoria, chapter 54.—*Reid v. Hamilton* (d).

2. Individual members of the corporation are entitled to notice, and on the same principle the corporation, when the members act collectively, are entitled to notice (e).

(a) 13 U. C. Q. B. 626.

(b) 13 U. C. Q. B. 627.

(c) *Ibid.* 628.

(d) 5 U. C. C. P. 290.

(e) 5 U. C. C. P. 290.

3. The corporation is entitled to notice, notwithstanding the argument that if the party had to wait until the by-law [if one were in question] had been quashed, his right of action might be outlawed.—*Barclay v. Darlington* (a). 1866. Hodgins  
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4. By-laws bear analogy to convictions, and both afford protection until quashed, and it is clear that justices are entitled to notice of action, and that the action must be brought in a limited time.—*Barclay v. Darlington* (b).

5. If a by-law be quashed the corporation has notice by statute that no action can be brought for a month, within which time they may tender amends, but where there is no by-law, and they have acted, as for instance under the 13 & 14 Victoria, chapter 15, they should, when performing a public duty imposed upon them by act of parliament, have notice before they are sued, as well as individual officers (c). Judgment.

The only point of difference and difficulty is whether the 14 & 15 Victoria, chapter 54, now consolidated by the act of Upper Canada, chapter 126, applies only to individual persons, or whether it does not apply also to municipal corporations.

The reasons that are given for confining it only to individual persons, which require special consideration, are:—The second reason above stated in support of the view of the Queen's Bench, which covers also the sixth and seventh reasons. The eighth reason of the Queen's Bench applying also to the ninth reason. The Common Pleas, by their first and second reasons, profess to answer the second reason of the Queen's Bench; and

(a) 5 U. C. C. P. 290.

(b) 5 U. C. C. P. 290, 439.

(c) *Ibid.* 290.



1866. by their third, fourth, and fifth reasons, to answer the eighth reason of the Queen's Bench.

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The other grounds stated why the statute does not apply to municipal corporations would not, in my opinion, prevent the application of the statute to such corporations, if the reasons lastly referred to do not alone prevent its application; they are relied upon rather as strengthening the other and principal reasons, and are not, I think, stated as sufficient reasons in themselves for excluding the application of the statute to corporations.

Judgment.

The following authorities will explain the grounds upon which I have formed my opinion. And, firstly, as to the meaning and application of our statute 14 & 15 Victoria, chapter 54, which is now represented by chapter 126 of the Consolidated Statutes for Upper Canada; it applies also clearly to public acts, local acts, and personal acts, and not only to public, *local* and *personal* acts.

In *Richards v. East (a)*, the Building Act 14 George III., chapter 78, was held to be an act of a local and personal nature; local as being confined to local limits, personal as affecting particular descriptions of persons only as distinguished from all the Queen's subjects, and therefore the right of pleading the general issue, and giving the special matter in evidence, provided for by that act, was held to be taken away by the 5 & 6 Victoria, chapter 97, section 5.

There are many cases in which companies are entitled to notice of action before suit is brought.

In *Garton v. The Great Western Railway Co. (b)*, the defendants were held to be entitled to notice of

(a) 15 M. & W, 244.

(b) El. Bl. & El. 837.

action under the words in the act, "that no action shall be brought against any *person* for anything done or authorized to be done, &c."—*Boyd v. The London and Croydon Railway Co. (a)*. 1866.

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The notice of action required to be given by chapter 126, section 10, is to be "delivered to him, or left for him at his usual place of abode;" and this, it is contended, means a delivery to the party *personally*, which cannot be made in the case of a corporation aggregate, and means also a leaving at a personal residence or abode, while a corporation aggregate can have no place of abode. *Delivering* to him can mean no more than *giving* to the intended defendant, which was the expression in *Ellis, Blackburn & Ellis*, 840, and in 2 Jurist, 327, and in both of these cases the corporations were held to be entitled to notice, although the word *person* only was used. I see no difficulty therefore arising from the requirement that the notice is to be *delivered* to the party.

Judgment.

Then as to *the place of abode*. In *Attenborough v. Thompson (b)*, the *residence* of a party was held to be sufficiently stated by giving his office or place of business, although it usually means *home*, or where the party dwells, or where he eats, drinks, and sleeps.

So *abode* is satisfied in some cases by stating the party's place of business. In *Blackwell v. England (c)*, *Erle, J.*, said, "*residence* is a word capable of bearing several meanings. The object of the enactment was to enable the party who suspected a fraud to trace the witness; for this purpose, his residence is to be given. Which meaning given to that word will best effectuate that object. I hold it impossible for any one, whose mind is not perverted by too much technical knowledge,

(a) 6 Sc. 461; 2 Jur. 327.

(b) 2 H. & N. 559.

(c) E. & Bl. 547.

1866. to doubt that the purpose is better effectuated by giving the place where the witness passes all his active hours, the place of business : than by giving the place of pernottation ; where the object is different, the meaning of the word may be different."

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In *Adams v. The Great Western Railway Co. (a)*, in which a great many cases are commented on, it was determined that a corporation can *dwell* at the place its business is carried on.

I find therefore no difficulty in holding the reference to the *place of abode* as any insuperable bar to the statute in this respect being held to be applicable to corporations.

Judgment. The 8th reason, before mentioned, is the principal one, why the statute should not be considered as having been extended to municipal corporations, and it is the one which the late Sir *James Macaulay* said raised "the strongest objection" he had felt to the construction being given to the statute which he had placed upon it.

When a by-law is illegal, and any act is done under it, which, by reason of such illegality, gives a right of action, the 202nd section of the present Municipal Act now requires, in addition to what the former acts required, that not only must the by-law be quashed, and the party wait for one month after it has been quashed before he shall bring his action, but he must also *give one month's notice in writing* of his intention to bring such action.

This was the principal argument relied upon against the 14 & 15 Victoria, chapter 54, being extended to such cases, because it was said, that if the month's

notice in writing were superadded to the time which it would take to quash the by-law, and to the month which must afterwards supervene between the quashing of the by-law and the commencement of the action, the period of six months allowed for bringing the action would almost if not altogether have expired. The present statute has certainly altered the law in this respect, and notice in writing must now be given, not by virtue of chapter 126, but by the special provision of the Municipal Act itself, which was probably made to meet this difference of opinion. I do not see, however, that the rights of parties who may have a ground of action are thereby injured, for there is no reason why the month which must have elapsed under the former law after the by-law was quashed, before the suit could be begun, should not be used by the party as a part of the time within which his written notice of action is also to be served; or why this could not have been done under the former law, if the act, 14 & 15 Victoria, chapter 54, could have been extended to corporations in other respects. Requiring a party to wait one month before he shall bring his action, and to give a month's notice in writing of his intention to bring it, does not necessarily involve the loss of two months' time, but really means no more than that after the by-law is quashed the party injured shall not bring his action until he has given one month's notice in writing of his intention to bring it. The difficulty which has been stated to have been in the way in applying the 14 & 15 Victoria, chapter 54, to municipal corporations, does not in this respect appear to me to have really existed.

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Judgment.

In those cases in which the by-law is not illegal, but in which the corporation have acted so as to subject them to an action while fulfilling a public duty, either under the common law or imposed upon them by act of parliament, there can be no special reason why the protection of the act, chapter 126, should not be equally

1866. extended to the body corporate, which it is admitted is applicable and does extend to their officers and agents in the self-same cases.

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Bruce.

The great purpose of the statute was, and is, to give protection to all those who are fulfilling a *public duty*, that is, who are performing acts which they are *bound* or *required* to perform, by reason of their public functions or character. They are permitted, in such cases, to tender amends for their wrongful conduct before they are sued for it. And why should this right, if granted at all, not be extended to corporations, as well as to their officers and servants? If there be any reason for making a distinction in such a case, probably it might be thought the corporation was entitled to greater protection than their subordinates, because it is frequently, though perhaps not universally, that it is the officer who is alone to blame—the corporation being held responsible merely as the principal, according to the maxim, “*respondeat superior* ;” and because corporations are commonly more severely amerced by juries than individuals are.

This act of parliament, however, only applies to *any act* or *any thing done*, and not to such omissions as are referred to in section 337 of the Municipal Act, or what was formerly the 13 & 14 Victoria, chapter 15, section 1 (*Carr v. The Royal Exchange Company*(a); and this perhaps is an answer to the argument, that in order to extend the 14 & 15 Victoria, chapter 54, to municipal corporations, the *three* months' period of limitation in the act of 1850 must be held to have been repealed, and the period extended to *six* months by the act of 1851 in every case.

The result of my consideration is, that by the express terms of section 202 of the Municipal Statute, where

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(a) 1 B. & S. 956.

any act which gives a cause of action, has been done under an illegal by-law, order, or resolution, no action can be brought against the corporation "until one month has elapsed after the by-law, order, or resolution has been quashed, nor until one month's notice in writing of the intention to bring such action has been given to the corporation." And for the reason before given, I think the limitation of six months next after the act complained of was committed, mentioned in chapter 126, does apply to municipal corporations. That by the express terms of section 337 the limitation of proceedings against the corporation for not keeping roads and highways in repair, is three months, which section, being restricted to cases of non-feasance, is not within the provisions of statute 126. And that in all other cases of acts done not under an illegal by-law, but done in the performance of their public duty, municipal corporations are entitled to notice of action under chapter 126, before they can be rightly sued in like manner and to the same extent that their officers and servants are; and therefore that this later statute extends to and includes municipal corporations.

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Bruce.

Judgment.

In this particular case the declaration shews the defendants had assumed this road; and that they afterwards made, formed, graded, and gravelled it. In the performance of which work this cause of action is alleged to have arisen. This is the power which they have under sections 339 and 340 of the present act. The declaration does not say this road was assumed by by-law, but this may be presumed as against the plaintiff. The evidence shews that the defendants, "in the exercise of their powers and duties under the Municipal Acts, built a gravel road," &c., and did the act from which the plaintiff contends he acquired his right of action. These acts were done in the year 1858, and the action was not brought until the year 1862.

The defendants moved for a nonsuit, because no

1866. notice of action had been given, and because the action had not been commenced within six months from the act committed. The motion for nonsuit was over-ruled, and the plaintiff recovered a verdict and \$100 damages. The defendants afterwards moved the Court of Queen's Bench for a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered pursuant to leave reserved, which the court refused to grant, in consequence of the series of decisions of that court which were adverse to the defendants' application.

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Bruce.

For the reasons before given, I think the nonsuit should have been ordered to be entered; and that there should be now a direction that the Court of Queen's Bench do order such nonsuit to be entered, upon the grounds which were taken at the trial

Judgment. I am not satisfied that the plaintiff can maintain an action for the cause stated in his declaration, that is, for the defendants "making a ditch for about two chains on the land of the plaintiff, through which the defendants caused water to flow from the road on to the plaintiff's land," because section 323 of the Municipal Act provides that "every council shall make to the owner of real property *entered upon, taken, or used* by the corporation in the exercise of its powers, in respect to roads, &c., due compensation for any damages necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration."

The cases of *The London and North Western Railway Company v. Bradley* (a), *Clothier v. Webster* (b), and many others of the same nature might be added, shew

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(a) 15 Jur. 689.

(b) 12 C. B. N. S. 790.

that where the statute confers the power to do the act complained of, and directs that compensation shall be awarded in a particular manner, the special mode of procuring that compensation must be pursued, which is in this case by arbitration, and not by suit.

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If, however, the defendants have done their work so negligently and unskillfully, that by reason thereof the plaintiff has sustained special damage, he may, notwithstanding the statute, still maintain an action for redress in respect of the special damage accruing from the negligence. *Lawrence v. The Great Northern Railway Company (a)*, *Imperial Gas and Coke Company v. Broadbent (b)*, and many other cases including those in 15 Jur. 639, and 12 C. B. N. S. 790, before cited. And it may be that the plaintiff does complain of negligence and unskillfulness on the part of the defendants in carrying out their authorized works; for he states that the defendants left the water on his land so conveyed there, "instead of causing the same to flow northerly in a ditch along the west side of the road to a natural water course situated within twenty chains northward of the culvert before mentioned, as it was the duty of the defendants to have done in the proper and lawful construction of the said road."

Judgment.

It is not necessary, however, to consider this further, as it was not raised either in the court below or in this court, and is not material in my view of the case on the other points; but I feel it right to call attention to the matter, as it may yet be necessary to consider it in some other case if it should arise for adjudication.

In my opinion the appeal should be allowed, and a nonsuit be directed to be entered in the court below.

(a) 16 Q. B. 648.

(b) 6 Jur. N. S. 1819.



1866. *MOWAT, V. C.*, concurred in the conclusion at which the Chief Justice of the Common Pleas and Mr. Justice Adam Wilson had arrived.

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*Bruce.*

*Per Cur.*—Appeal dismissed with costs. [*Richards, C. J., A. Wilson, J., and Mowat, V. C., dissenting.*]

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[*Before the Hon. W. H. Draper, C.B., C.J., the Hon. W. B. Richards, C.J.C.P., the Hon. Vice Chancellor Spragge, the Hon. Mr. Justice Morrison, the Hon. Mr. Justice A. Wilson, the Hon. Mr. Justice J. Wilson, and the Hon. Vice Chancellor Mowat.*]

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ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

GOTTWALLS V. MULHOLLAND.

*Bond fide sale or conveyance by an insolvent.*

Where traders, on the eve of insolvency, and after service of process at the suit of one of their creditors, sold all their stock in trade to a purchaser, from whom they accepted promissory notes at long dates, but the jury found that such sale was made *bond fide*, and with a view of enabling the insolvents to divide the proceeds among their creditors equally:

*Held*, affirming the judgment of the court below, that such sale was valid; but, if the sale had been made with intent, by vendor and purchaser, to defeat or delay creditors, it would have been void, though made *bond fide* with the intention of passing the property.

*Statement.* This was an appeal from a judgment of the Court of Common Pleas, as reported in the fifteenth volume of the Reports of that Court, at page 62, where the facts of the case are so clearly stated as to render any statement here unnecessary.

From that decision the defendants appealed on the grounds—

1. That the learned judge misdirected the jury in charging them that if the alleged sale or transfer to the

plaintiff was a transaction for the purpose of transferring the property absolutely to the plaintiff, even though made with intent to defeat the defendants' execution, it might be sustained, though the debtors who made the sale were shewn at the time of sale to be in insolvent circumstances.

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2. That the learned judge should have charged the jury that the debtors, being at the time of sale in insolvent circumstances, if the sale were made by them with intent to defeat or delay creditors, the transfer, unless an assignment for the purpose of paying and satisfying all creditors ratably and proportionably, and without preference or priority, or unless a *bond fide* sale in the ordinary course of trade to an innocent purchaser, was void.

3. That the alleged sale or transfer having been made at a time when the debtors were shewn to have been in insolvent circumstances, as the plaintiff well knew, the question of intent should have been left to the jury; and if the jury found that the sale or transfer was made with any of the intents mentioned in section 18 of Con. Stat. U.C. cap. 26, and was not within the exceptions mentioned in that section, the sale or transfer was void as against creditors, and that at all events the question of the plaintiff's knowledge, if material, should have been submitted to the jury.

4. That the question whether the plaintiff knew or did not know of the insolvent circumstances of the debtors at the time of the alleged sale or transfer was immaterial, if the debtors were at the time of the alleged sale or transfer in insolvent circumstances, and not within the exceptions mentioned in sec. 18 of Con. Stat. U.C. cap. 26, and made the alleged sale or transfer with any of the intents mentioned in that section.

5. That the alleged sale or transfer was shewn upon

1866. the facts proved at the trial to have been in law void as  
 against the defendants.  
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 Mulholland.

The plaintiffs contended that the judgment of the court below was correct for the reasons therein mentioned.

Mr. *Paterson* and Mr. *Palmer* for the appeal. The law, as settled by *Wood v. Dixie*, cannot be applied to a case circumstanced like the present. In that case the purchaser was himself a creditor of the insolvent; in this case he is, as regards the creditors, a mere stranger, and the wording of our statute in effect overrules the law as established by *Wood v. Dixie*.—*McMaster v. Clare* (a), *Bott v. Smith* (b), *Harman v. Richards* (c).

Argument The debtor, under our statute, will not be permitted to prefer any one or more creditors to the exclusion or injury of the general body, neither will he be allowed to hinder or delay any creditor; any such acts, or conduct amounting to such act, is void.—*Lacon v. Liffen* (d), *White v. Stevens* (e), *In re Marshall* (f), *Buchanan v. Cunningham* (g), were cited.

Mr. *Anderson*, contra, relied on the views expressed by the judges of the court below, as shewing the plaintiff was entitled to retain the judgment which had been given in his favor.

Much of the argument urged on behalf of the appellants would be applicable when the verdict was objected to as not warranted by the facts, while here the only matter open to the parties is the objection to the charge of the learned Chief Justice, as relied on in the court below.

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(a) 7 Gr. 559.

(e) 10 Hare, 81.

(f) 7 U. C. Q. B.

(b) 21 Beav. 511.

(d) 7 L. J. N.S. 774.

(f) 8 M. D. & DeG. 671.

(g) 10 Gr. 518.

The provisions of our act are substantially the same as the statute of Elizabeth. The exceptions are not incorporated in our act as is contended by the appellants. Our statute introduces preference as equivalent to a sale to defeat or delay creditors. Here the question as to the proper inference to be drawn from the facts does not arise, and in this respect the cases cited as having been decided by the Court of Chancery, have no application, for there the court have to find the facts as well as apply the law.

1866.  
Gotiwalls  
v.  
Mulholland.

A transaction is not necessarily void because it *may* hinder or delay creditors; that must be the object and intent of the parties to the transaction, otherwise the act will be valid.

He referred, amongst other authorities, to *Twynne's* case (a), *Baxter v. Pritchard* (b), *Lee v. Hart* (c), *Luff v. Homer* (d), *Darvill v. Terry* (e).

DRAPER, C. J.—*Thomas and William Luscombe* Judgment. commenced mercantile business as partners at a country village, on the 1st of October, 1862, and became indebted to four firms in from \$1600 to \$1700. The defendants were their creditors to the amount of \$413, upon promissory notes, indorsed by one *Yeomans*, and, according to the evidence of *William Luscombe*, they paid the money due thereon to *Yeomans*, thinking that these notes were in his hands. *Yeomans* failed—not having retired the notes out of defendants' hands—and the defendants commenced an action against the makers and indorsers. The *Luscombes*, finding that they could not meet their liabilities, on the 26th of March, 1863, sold their stock in trade to their brother-in-law, the plaintiff, at the invoice prices thereof, for \$1052, for which sum they took his

(a) 1 Sm. L. Ca., p. 18.

(c) 10 Exch. 555.

(b) 1 A. & E. 456.

(d) 3 F. & F. 430.

(e) 6 H. & N. 307.

1866. notes, payable in one, two, three and four years. It was proved that the plaintiff was in good circumstances, and able to pay the notes, and the long credit given was explained by the statement that the goods were a winter stock, and he would not be able to realize anything from them until the following winter. The *Luscombes* indorsed the plaintiff's notes and delivered them to one of their creditors for the benefit of all who would accept them, and give the *Luscombes* a discharge. The defendants refused to come in, alleging that it would prejudice their claim against *Yeomans*, and they prosecuted their suit to judgment and seized the goods sold to the plaintiff under a *fi. fa.* The plaintiff contested their right, and an interpleader was ordered and tried. It appeared that the plaintiff was most probably aware of the action having been commenced by the defendants when he purchased the goods. The jury were asked to say if they were satisfied that the sale to the plaintiff was made *bonâ fide* with intent to transfer the property to the purchaser, and not colorably, in order to hold it for the *Luscombes'* benefit. If it was not made *bonâ fide*, to find a verdict for the defendants; if it was, to find for the plaintiff, though the effect would be to prevent the defendants from selling upon their execution. To this direction it was objected that the jury should have been told that if the *Luscombes* were in insolvent circumstances the sale was void—not being made under ordinary circumstances—, under the Consolidated Statutes of Upper Canada, chapter 26, section 18.

Gottwalls  
v.  
Mulholland

Judgment.

The jury found for the plaintiff, and said that the sale was in good faith to dispose of the property to the plaintiff, and to enable the *Luscombes* to realize from it, and to dispose of the proceeds equally among their creditors.

The defendants applied for a new trial on the law and evidence, and for misdirection. The Court of Common

Pleas (*dissentiente*, J. Wilson, J.) discharged the rule, 1866.  
and the appeal is against that decision.

Gottwalle  
v.  
Mulholland.

The finding of the jury has in effect determined that the sale and transfer of these goods was not made for any fraudulent purpose, involving both that of defeating or delaying creditors and of giving a preference contrary to the statute. Indeed the latter alternative can hardly be supposed to have arisen, inasmuch as the transfer was not to a creditor, and there was no doubt cast upon the statement that the notes given by the plaintiff were lodged with a creditor of the *Luscombes* for the benefit of all their creditors who would accept them and give a discharge.

The objection that the sale not being one in the ordinary course of business, and having been made by persons in insolvent circumstances, was therefore void, seems to me an effort to convert an exception introduced *ex abundante cautela* to the general language contained in the preceding part of the section, and which might otherwise have been construed to include even sales made in the ordinary course of business to innocent purchasers, into an additional definition of what would be a sale void under the act. The rule is, that any sale or transfer of goods made with intent, &c., shall be void; but from this rule are excepted sales in the ordinary course of trade to innocent purchasers, although made on the vendor's part with the prohibited intent. Judgment.

The learned Chief Justice does not seem to have been asked in terms to charge the jury that if the execution debtors made the sale with intent to defeat or delay their creditors, it would be void; and the whole tenor of the proceedings, as shewn by the evidence, was so much against that conclusion, taken by itself, that it is unlikely he should have been asked to present the question in those terms. He put the question broadly to the jury, whether in view of all the circumstances the

1866. sale was made in good faith and intended to pass the property, he was asked to direct that, assuming the  
*Gottwails*  
v.  
*Mulholland.* *Luscombes* were insolvent, the sale was void because not made in the ordinary course of trade.

I think that the learned Chief Justice rightly refused to put that construction on the statute, and upon this ground I think the rule for a new trial was properly discharged, for unless that objection were sustainable as a legal proposition, the verdict of the jury was sustained by the evidence. As the law stands, the charge would more clearly have expressed our views if it had been to the effect, that although the sale may have been *bond fide* with the intention to pass the property, yet if made  
Judgment. with intent by vendor and purchaser to defeat and delay creditors, it would be void against the defendants; but if made, as the facts in this case shew, to dispose of the proceeds ratably among all his creditors, it is valid.

I think, therefore, the appeal should be dismissed with costs.

*Per Curiam.*—Appeal dismissed with costs.

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1866.

[*Before the Hon. W. H. Draper, C.B., C.J., the Hon. W. B. Richards, C.J. C.P., the Hon. Mr. Justice Hagarty, the Hon. Mr. Justice A. Wilson, the Hon. Mr. Justice J. Wilson, and the Hon. Vice Chancellor Mowat.*]

ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

SMITH V. LYNN.

*Railway Company—Forfeiture of Stock.*

To an action by a judgment creditor of the Port Hope, Lindsay and Beaverton Railway Company against a shareholder for the amount of his unpaid stock, the defendant set up that the full amount of stock required by the act of incorporation had never been subscribed, or the first instalment paid thereon; that the original design of the company had been changed by statute after the defendant subscribed; that the stock subscribed for by the defendant had long since become forfeited for non-payment of calls; that on the 14th of May, 1853, the directors passed a resolution declaring that the shares mentioned in a schedule intended to be annexed (but which was not annexed) to the resolution, which had become forfeited by non-payment of a call made on the previous 21st of January, should be sold on the 20th of June, unless previously redeemed; and that the company had not afterwards treated the defendant as a shareholder, nor had he acted as such. The resolution for sale of the stock had not been acted on by the company, a statute having passed before the day named for sale making new provisions as to forfeiture or abandonment of shares which had not been complied with. *Held*, that the defendant was still liable as a shareholder.

This was an appeal by the defendant from a judgment Statement of the Court of Common Pleas.

The declaration stated to the effect that the plaintiff, on the 28th day of May, 1861, in the Court of Common Pleas for Upper Canada, recovered judgment against the Port Hope, Lindsay and Beaverton Railway Company, for £3,762 9s. 3d. damages, and £25 16s. 7d. costs, on which a writ of *fi. fa.* was duly issued, indorsed and delivered to the proper sheriff for execution, who made a return thereto of *nulla bona*.



1866.

Smith  
v.  
Lynn.

The declaration further stated the passing of several acts of parliament incorporating and changing the name of the railway company; the fact of defendant having become a subscriber for stock therein to the amount of £100, and that he had not paid the amount of the stock so taken by him in the company, or any part thereof, or the interest payable thereon by virtue of said statutes, or any part thereof, although the defendant was a shareholder in the said company to the extent of ten shares, and that the whole amount of his stock, and the interest payable thereon, were unpaid by the said defendant, whereby an action accrued to the plaintiff to demand and have of and from the defendant an amount equal to the amount unpaid on the stock so held by him; adding the common count for interest.

The defendant, as to the first count of the declaration, pleaded that he was not a stockholder in the said company, as alleged; and pleaded to the whole declaration that he was never indebted as alleged; on which pleas the plaintiff joined issue.

The case came on for trial at the autumn assizes of 1863, for the United Counties of Northumberland and Durham, before Mr. Justice *Hagarty*.

The defendant admitted the recovery of the judgment in the declaration mentioned; the issue of the *fi, fa.* goods, as therein mentioned; the delivery thereof to the sheriff, and its return as alleged; and that the plaintiff's judgment was unsatisfied, and that he could not be satisfied out of the goods of the company.

The defendant also admitted the subscription by him of the stock book of the company, produced at the trial, for the number of shares mentioned in the declaration.

The defendant also admitted that he had paid, in the year 1847, \$10 on account of his stock so subscribed.

Defendant also admitted that a call of five per cent on the stock of the company was made on the 21st of January, 1853, which he did not pay, and that subsequent calls were regularly made on the 18th of June, in the year 1857, for 95 per cent., being the remainder of the stock, and were regularly called in, but defendant did not pay the same, or any part thereof.

1866.  
Smith  
v.  
Lynn.

Defendant also admitted that if plaintiff was entitled to recover at all against him, he was entitled to the sum of \$514 25.

It was then agreed that a verdict should be entered for the plaintiff for \$514 25, subject to the opinion of the court on the pleadings, the admissions, and a case to be stated between the parties, involving the facts, proved in Toronto before the late Mr. Justice *Burns*, in *Smith v. Spencer* and *Fraser v. Hickman*, both of which cases had previously been before the Court of Common Pleas, with liberty to the defendant's counsel to raise the objections taken by counsel for the defendants in those cases.

Statement.

The material facts proved in those cases, and which it was agreed should be taken as if proved in this case, were substantially the following :

The railway company was incorporated by statute 10 Victoria, chapter 109 ; stock was subscribed in the book produced at the trial of this cause ; a payment of two and a half per cent. on the stock was made ; a preliminary survey was made in 1848, but no other steps were taken towards the construction of the road until after the passing of the act 16 Victoria, chapter 49, and chapter 241 ; the books were then re-opened and additional stock subscribed by many who had previously subscribed ; others who had not previously subscribed became subscribers.

1866.

Smith  
v.  
Lynn.

The road was built principally out of stock subscribed by different municipalities interested in the construction and completion of the railway after the passing of 16 Victoria, chapter 49.

The secretary of the company was Mr. *Benson*, (now deceased). He frequently, so far as could be ascertained, without any instruction from the board of directors, prepared lists of shareholders entitled to vote at annual elections, and of persons eligible to be elected directors at such elections. Defendant's name never appeared on any such lists. Defendant did not avail himself of the provisions of 16 Victoria, chapter 241, section 4, by signifying to the president of the company his intention of withdrawing.

And it was also admitted that the directors of the company, on the 14th of May, 1853, passed a resolution  
Statement. in the following words :

"That the share or shares of the original stockholders of the company, mentioned in the annexed schedule, which have become forfeited by reason of the neglect of such stockholders to pay the instalment called for by the public notice of the 21st day of January last, be sold on the 20th day of June next, at noon, at the office of the company in Port Hope, unless the same shall be previously redeemed, pursuant to the statute in that behalf."

It was also admitted that no evidence was given that any such schedule as that mentioned in the resolution was ever prepared ; and it was further admitted that nothing more was done after the resolution was passed in reference to forfeiting the stock.

Afterwards, in the year 1858, Messrs. *McLeod* (the managing director) and *Ridout* (the secretary) prepared a statement of the assets of the company, which was

issued by the directors and submitted to the Bank of Upper Canada, creditors of the company; and in that statement they (Messrs. *McLeod* and *Ridout*) did not include the names of any of the old subscribers, because, as they stated, they (Messrs. *McLeod* and *Ridout*) did not consider the old stockholders liable. The defendant never took any part in the affairs of the company after his original subscription beyond the payment of the \$10 before mentioned, and was never individually notified of meetings of the company, or its business transactions.

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Smith  
v.  
Lynn.

The plaintiff was director of the company in 1853, and every year afterwards until 1857, and on the 28th June in that year he lent the company £3000 at 12 per cent. per annum interest, on the terms of the resolution at page 164 of the minute book. Plaintiff's judgment was recovered for amount of loan, and interest at six per cent. only.

Statement.

The defendant contended that the plaintiff was not entitled to recover against him, for the following reasons:

1st. That the subscription book, signed by the defendant, was not sufficient evidence to prove that the defendant was a shareholder, and that there is no other evidence of the fact.

2nd. That the liability of the defendant as a stockholder was not revived or continued by the Acts 16 Victoria, chapters 49 and 241, and the defendant is discharged from liability as a stockholder by the abandonment of the original design or project of the company, under 10 Victoria, chapter 109, and by its subsequent alteration; and by the company never treating him as a stockholder after its revival, and thereby abandoning and rescinding the contract to take stock.

3rd. That the company never legally went into ope-

1866. ration ; the provisions of the statute incorporating it not having been complied with ; the full amount of stock never having been subscribed ; and the first instalment of five per cent. on the stock never having been paid.

Smith  
v.  
Lynn.

4th. That the stock of the defendant was forfeited on non-payment of the call made on the 21st January, 1853, under the provisions of the statute, and by the acts and resolutions of the company.

5th. That the contract on which the plaintiff recovered judgment, was an illegal contract and void, being for a loan of money by a director to the company at illegal interest, and contrary to the provisions of the statute in that behalf.

6th. That the defendant, under the pleadings and evidence forming part of the case, and the statutes relating to the company, was not liable for the amount sued for by the plaintiff.

Statement.

The question raised for the opinion of the court below was, whether the plaintiff, notwithstanding the objections raised, was entitled to recover. In consequence of the decision of *Fraser v. Robertson* (a), there was no argument in this case, as it was understood the defendant would appeal ; and the case was decided without argument, and judgment given in favor of the plaintiff.

Against this judgment the defendant appealed, and stated the following reasons of appeal :—1st. Because there is error in law in the judgment of the Court of Common Pleas ; and that the judgment should have been given for the defendant. 2nd. Because on the pleadings, evidence and special case stated, and on the law, the defendant is entitled to the judgment of the court.

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(a) 13 U. C. C. P. 184.

The plaintiff contended the judgment in his favor was correct.

1866.

Smith  
v.  
Lynn.

Mr. *Donald Bethune*, for the appeal.

Mr. *C. S. Patterson*, contra.

After taking time to look into the authorities—

DRAPER, C. J.—Want of leisure has prevented me making any written statement of my views in this case, I may state, however, that the members of the court are unanimously of opinion that the judgment of the court below is correct, and that this appeal therefrom must therefore be dismissed with costs.

HAGARTY, J.—I think the defendant *Lynn* was not released from his position as a shareholder, as he did not avail himself of the power of discharge allowed by statute 16 Victoria, chapter 241. That the resolution to sell forfeited shares, passed 14th May, 1853, and to sell them on the 20th June, then next, never having been further acted on, does not release the defendant from liability.

Judgment.

The act 16 Victoria, chapter 241, was passed 14th June, 1853, in the interval between the date of the resolution and the day fixed for sale, and introduced new provisions as to forfeiture of stock, and especially that forfeiture must be declared at a general meeting of the company assembled after forfeiture incurred.

This act also gives express powers to sue. I think it impossible to hold that the shareholder can insist on his being discharged by the resolution of the 14th May, 1853, on which no action was taken.

The plaintiff's judgment was recovered in May, 1861. The defendant was then a shareholder, and, in my

1866.

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v.  
Lynn.

Judgment.

opinion, the amount unpaid on his stock was liable to the judgment creditors of the company. At that time, and since 1853, the company had the power to sue for calls by express enactment (if not from the creation of the company). I do not; however, see how the statutable right of a judgment creditor is or can be affected by the action or inaction of the directors in calling in stock. The statute seems to make the unpaid stock an asset for the payment of judgment creditors, whose right seems to be unaffected by the action of the directors. In a very recent appeal, *Wickham v. The New Brunswick Land Company (a)*, Lord Chelmsford says, "The judgment creditors take what belonged to the company, but do not take under them." A large portion of the appellant's argument went to shew that the company could not make him pay up calls on his stock, as they had then no power to sue. This, I think, has no bearing upon the right of the judgment creditor to be paid his claim out of the subscribed but unpaid stock; nor can the stockholder urge his own default in paying up, as working a forfeiture of his stock, and thereby protecting him from future liability. The resolution by itself, without further action, cannot, I think, have any such effect, especially after the passing of the act which came into force in the interval between the resolution and day of sale.

*Per Curiam*—Appeal dismissed with costs.

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(a) Privy Council L. R. App. Series, April, 1866,

1866.

[*Before the Hon. W. H. Draper, C.J., the Hon. W. B. Richards, C.J., C.P., the Hon. Mr. Justice Hagarty, the Hon. Mr. Justice Morrison,\* the Hon. Mr. Justice A. Wilson, the Hon. Mr. Justice J. Wilson, the Hon. Vice-Chancellor Mowat.*]

ON AN APPEAL FROM THE COURT OF CHANCERY.

MENEILLY V. MCKENZIE.

*Fieri Facias Lands—Time for Renewing.*

Where shortly before the return day of a *fi. fa.* against lands, the plaintiff therein obtained it from the Sheriff for the purpose of renewing the writ, and did not return it for fifteen days, when a year from the teste had expired; *Held*, that these circumstances did not amount to an abandonment of the plaintiff's rights under the execution.

This was an appeal from the Court of Chancery. The plaintiff was *Mary Meneilly*, and her bill stated that under and by virtue of an indenture of bargain and sale, by way of mortgage, bearing date the 10th of March, 1862, and made between one *Francis Jones*, of the first part, and the plaintiff, of the second part, the plaintiff was mortgagee of certain freehold property therein described, situate in the Township of Oxford, in the County of Grenville; that the time for payment of the mortgage money had elapsed, and no sum had been paid on account of principal, but the interest had been paid up to the 10th day of March, 1863; that there was justly due, under and by virtue of the said indenture of mortgage, for principal the sum of \$1000, and for interest the sum of \$240; and that the plaintiff had not been in the occupation of the mortgaged premises.

Statement.

The bill further stated that the Sheriff of the united Counties of Leeds and Grenville, under and by virtue of

\* The name of the Hon. Mr. Justice Morrison was accidentally omitted in the preceding case.



1866. a writ of execution against the lands of the said *Francis Jones*, on the 3d day of November, 1863, sold the interest of the said *Francis Jones* in the said lands to the defendant *Gordon Gates McKenzie*, one of the plaintiffs in the suit in which the writ was issued, and that the Sheriff, on the 20th day of April, 1864, by deed of that date and in pursuance of the said sale, conveyed the property to the said *McKenzie*; that the said *Gordon Gates McKenzie* pretended that under and by virtue of the said sale he had acquired the land freed and discharged from the plaintiff's mortgage, but the plaintiff charged the contrary, and the plaintiff showed that the said writ of execution was not placed in the hands of the Sheriff for execution until a long time after the execution of the mortgage to the plaintiff, and although the writ had at a former period been in the hands of the Sheriff, yet the same was not placed then in his hands for execution, and no proceedings were taken under the writ, but it was withdrawn from the Sheriff, and afterwards and after the expiration of more than two weeks delivered back to him; that the defendant pretended that the writ was always in the Sheriff's hands for execution, and that it was not withdrawn from the Sheriff, but was only taken away for the purpose of renewal; but the plaintiff alleged that the said writ, if only withdrawn for renewal, could have been replaced in the Sheriff's hands on the next day after it was so withdrawn, whereas the plaintiff deliberately withheld the writ for fifteen days; and that the defendant was entitled to the equity of redemption in the said lands.

Statement.

The plaintiff therefore prayed that the deed from the Sheriff to the defendant might be declared only to have passed the equity of redemption; and that the plaintiff might be paid the said sum of \$1000, and interest thereon, and the costs of suit, and, in default thereof, that the equity of redemption in the said land might be foreclosed; that for the purposes aforesaid all proper directions might be given and accounts taken,

and that the plaintiff might have such further and other relief as might seem meet. 1866.

Menelly  
v.  
McKenzie.

The defendant, in his answer to the bill, admitted that the plaintiff took a mortgage on the premises in the bill mentioned, but he said that when the mortgage was executed there was a writ of *fieri facias* in the hands of the Sheriff against the lands of *Francis Jones*, the mortgagor and judgment debtor, at the suit of the defendant and his copartner, and that the premises were afterwards duly sold by the Sheriff under a writ of *venditioni exponas* for part, and *fieri facias* for residue, after a return, of lands on hand for part, to the writ, and duly purchased by the defendant at such sale, and that a proper deed thereof was executed to the defendant; that the said writ of *fieri facias* had been issued some time previous to the execution of the said mortgage, and that the said writ and *venditioni exponas* were in force at the time of the execution thereof, continuously until the said sale; the defendant also admitted that the writ of *fieri facias* was returned for renewal when the same was about to expire, some time after the execution of the mortgage, but alleged that the said writ was not abandoned, and that the same was duly re-issued shortly, or at least in about two weeks after the same had been returned for renewal as aforesaid, nor was it ever deliberately withheld, as in the said bill untruly alleged.

Statement.

Therefore the defendant claimed to own and hold the premises, freed and discharged from any lien thereon by reason of the said mortgage, and prayed that it might be so declared, and that the same might be delivered up to be cancelled, and the plaintiff ordered to pay the costs of the suit.

A motion for a decree was thereupon made by the plaintiff, the parties admitting for the purpose of hearing the motion the following facts and documents :

1866. that the writ of *feri facias* against lands of *Francis Jones*, under which the defendant claimed the premises in question in the cause, was regularly issued from the office of the Deputy Clerk of the Crown, at Cornwall, on the 31st December, A.D., 1861; that at that time the said *Francis Jones* was the owner of the premises in question in the cause; that the said writ was placed in the hands of the Sheriff of Leeds and Grenville, at Brockville, on the 1st day of January, A.D., 1862; that the said *Francis Jones* executed the mortgage to the plaintiff, in the bill mentioned, on the 10th March, A.D., 1862; that the said mortgage was registered on the 14th March, A.D., 1862; that the said writ of *feri facias* remained with the said Sheriff until the 29th December, 1862, when it was given by him to the Attorney for the plaintiff in that suit, to be renewed, and it was on the same day renewed; that the said writ was, on the 13th January, 1863, again handed to the Sheriff; that the said writ was returned, lands on hand as to part, and no lands as to the residue, on 2nd November, A.D., 1863; that a writ of *venditioni exponas* and *feri facias* residue was placed in the Sheriff's hands on the 17th November, A.D., 1863, and the advertisement of the sale of the said lands was first inserted in the *Gazette*, on the 6th day of August, 1863; that the Sheriff sold the said lands to the defendant, on the 8th April, A.D., 1864, and executed a conveyance to him, dated 20th April, 1864; that at the date of the delivery of said writ of *feri facias* for renewal, and from thence until the writ was replaced in the Sheriff's hands, there were two mail trains every day, excepting on Sundays, passing Cornwall and Brockville in each direction, as follows :

Statement.

|                 |            |                  |            |
|-----------------|------------|------------------|------------|
| L've Brockville | 5:40 p.m.  | —Ar. at Cornwall | 8:05 p.m.  |
| “ “             | 8:30 a.m.  | “ “              | 12:35 p.m. |
| “ Cornwall      | 3:00 p.m.  | “ Brockville     | 7:00 p.m.  |
| “ “             | 11:30 a.m. | “ “              | 2:00 p.m.  |

and that there were mails every day each way between

Cornwall and Brockville, but it was not admitted that the trains ran regularly at that season of the year. 1866.

Meneilly  
v.  
McKenzie.

The cause was heard on motion for decree (12th December, 1865), before Vice-Chancellor *Mowat*, who at the close of the argument delivered judgment, dismissing the plaintiff's bill with costs, on the ground that neither the delay of the Sheriff, nor the time which elapsed after the withdrawal of the writ from the Sheriff for the purpose of being renewed, and the return thereof to the Sheriff, amounted to an abandonment of the writ, or proved that it was not delivered to the Sheriff for execution, so as to prevent it from attaching upon the land in priority to the plaintiff's mortgage.

By the decree drawn up the Court declared that the defendant held the premises free and discharged from any lien thereon by reason of the plaintiff's mortgage, and dismissed the bill.

Statement.

From this decree the plaintiff appealed; for the following reasons :

1. That the respondent and his partner, by delaying to enforce their execution from the 1st day of January, 1862, until the commencement of execution by advertising in the *Gazette*, on the 6th day August, 1863, abandoned the said writ, and furnished sufficient evidence that the writ was not, until after its renewal, put into the Sheriff's hands for execution.

2. That the respondent and his partner abandoned the execution by withholding it from the Sheriff, when taken for renewal, an unreasonable and unnecessary time, viz., from 29th December, 1862, to 13th January, 1863.

3. The respondent and his partner, by neglecting to re-deliver their execution to the Sheriff, after renewal

1866. thereof, until after the expiration of one year from the *teste* thereof, lost any priority they may have had previous to renewal over the appellant's mortgage, no commencement of execution having been made previous to renewal.

Menelly  
v.  
McKenzie.

4. That in order to retain priority of original execution, mere renewal is insufficient without a re-delivery to the Sheriff, which re-delivery, to make renewal complete and effective for retaining its original priority, must be within one year from the *teste* of the original execution, and the respondent and his partner having failed thus to renew and re-deliver their execution within one year from the original *teste*, lost their priority over the appellant's mortgage.

5. That although an execution be renewed within the year from its original *teste*, yet a neglect to re-deliver same to Sheriff until after the expiration of the year, is evidence of an abandonment of the original delivery, and thenceforth such renewed execution will only bind from the date of its re-delivery to the Sheriff, and that by reason of such neglect the respondent and his partner must be considered to have abandoned the original delivery of their execution.

Statement.

6. That the respondent and his partner abandoned the original delivery of their execution to the Sheriff (so far as priority was concerned), by neglecting to re-deliver their execution to the Sheriff (although renewed by the proper clerk within the year), until several days after the expiration of one year from the *teste* thereof.

Mr. Anderson for the appellant referred to *Mein v. Hall* (a), *Rowe v. Jarvis* (b), *Blades v. Arundale* (c), *Doe Tiffany v. Miller* (d), *Muir v. Munro* (e). Page 213 of the Consolidated Statutes of Upper Canada.

(a) 13 U. C. C. P. 518.

(b) 13 U. C. C. P. 495.

(c) 1 M. & S. 711.

(d) 10 U. C. Q. B. 65.

(e) 23 Q. B. U. C. 139.

Mr. *McGregor* for the respondent.

1866.

After taking time to look into the authorities, the Court affirmed the decree on the grounds stated in the judgment of the Vice-Chancellor: and dismissed the appeal with costs.

### PARKE v. RILEY.

#### *Sheriff's Sale—Parol Evidence.*

*A.* entered into a parol agreement with *R.*, for the sale to him of certain land, received part of the price and gave *R.* possession of the premises. *A.* subsequently assigned by parol the balance of the price to *S.*, to whom he was indebted. *P.*, after this assignment, delivered to the Sheriff an execution against the lands of *A.*, and became the purchaser at the sale by the Sheriff:

*Held*, that under these circumstances no interest in the land passed under the Sheriff's deed.

This was an appeal from a decree of the Court of Chancery, as reported in the 12th volume of the reports of that Court at page 71: The bill in the court below set forth that be a certain deed poll, made by *Thomas A. Corbett*, Esquire, Sheriff of the United Counties of Frontenac, Lennox and Addington, dated the 3rd October, 1864, after reciting that; by virtue of a writ of *fiery facias*, issued out of the Court of Common Pleas, in the Province of Canada, tested, 29th October, 1862, and a renewal of the said writ of *fiery facias* for one year from the 28th day of October, 1863, and of all other writs of execution, a list of which was thereon endorsed and to the said Sheriff directed, commanding him that, of the lands and tenements of *George Andrews*, *Henry Andrews*, and one *George W. Andrews*, he should cause to be made the sum of \$994.47, he had seized and taken as the lands and tenements of the said *George Andrews*, *Henry Andrews* and *George W. Andrews* all that certain tract, piece or parcel of land, situate in the township of King-

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ston : and being composed of part of lot number 15, in the 2nd concession of the township of Kingston, containing two-fifths of an acre, situate in the village of Waterloo, as described in a deed of conveyance thereof to one *William Giddy*, dated the 9th October, 1851, and registered the 15th October, 1851, at two o'clock in the afternoon. Memorial number 309, township of Kingston, the said Sheriff did, by virtue of the said writ, and and in consideration of the sum of \$350, then paid the said Sheriff by the plaintiff, grant, bargain and sell to the plaintiff all the estate, right, title and interest, which the said *George Andrews*, *Henry Andrews* and *George W. Andrews* of right had of, in and to the said lands, as fully and absolutely as he, the said Sheriff, could, or ought to grant the same, by force of the said writ or otherwise.

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That he said deed poll was duly registered in the registry office for the county of Frontenac, on the 5th October, 1864 ; that on the 14th day of June 1857, one *William Giddy*, then being the owner in fee of the said lands, sold and conveyed the same by indenture to the defendants, *George Andrews* and *Henry Andrews*, and to one *Edwin Andrews*, who died intestate and without issue, and to whom the said *George Andrews* was heir-at-law, and that the said *George Andrews* and *Henry Andrews* two of the execution debtors named in the said writ, at the time of the receipt of the writ by the Sheriff, were the owners in fee of the said lands ; that the said indenture had never been registered against the said lands ; and that the same was in the custody or power of the defendants, or some or one of them ; that on the 13th June, 1864, the defendants, *George* and *Henry Andrews*, executed a deed in fee simple to the defendant *Alfred Riley*, of the said land, at the request of the defendant, *John Smith*, which deed was ante-dated and bears date the 10th day of April, 1861, and was not registered ; that on the said 13th day of June, 1864, at the request of the defendants, *George Andrews*,

*Henry Andrews* and *John Smith*, the defendant *Riley* executed a mortgage on the said lands, for the sum of \$600 to the said *Smith*, to secure the payment of a debt due jointly by the said *George Andrews* and *Henry Andrews*, and *George W. Andrews* to the said *Smith*; and thereupon agreed in writing with *Riley* for making the said mortgage void, in case he should be ordered to pay the said purchase money to any other person by any court of law or equity; that all the defendants, at the time of the making of the said deed to the defendant *Riley*, and of the making of the said mortgage by *Riley*, well knew of the said writ of *fiery facias* in the Sheriff's hands, and combined together to prefer the debt of the defendant *Smith* over that of the execution creditor.

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The bill prayed that the deed from the said *Giddy to Andrews* might be registered, and that the same and all other title deeds of the said lands might be delivered up, and that the deed to *Riley*, and the mortgage to *Smith*, might be declared void against the deed, and a cloud upon his title, and ordered to be delivered up to be cancelled and the defendants ordered to pay the costs of the suit; and, for the purpose aforesaid, that all proper directions might be given, and accounts taken, and for general relief.

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The answer of the defendants stated that the defendants, *George Andrews*, *Henry Andrews* and *Alfred Riley*, did contract for the sale to, and purchase in fee simple by *Alfred Riley*, of the premises in the said bill mentioned for the sum of \$600, upon the terms that the defendants, *Andrews* should execute to *Riley* and his heirs a conveyance of the said premises, and that *Riley* should execute to the defendants *Andrews*, and their heirs, a mortgage on the same, securing the said purchase money and interest: and, in pursuance, and part performance of such contract, the defendant, *Riley*, was admitted and entered into possession and occupation of



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the said premises, and made valuable improvements thereon, and paid a part of his purchase money, and had ever since remained in such possession and occupation; and the contract, upon such admission and entry, became, and has ever since continued binding, and capable of enforcement at the instance of either of the parties thereto; and the defendants *Andrews*, then became, and till the execution of the conveyance to *Riley*, continued to be, trustees for *Riley*, for their estate in the said premises, subject to the execution by *Riley*, of a mortgage thereon, securing the purchase money and interest, which became and was a debt due by *Riley* to the defendants *Andrews*, in respect of which they were entitled to a lien on the premises.

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Thereafter the defendants, *Andrews*, for a valuable consideration, given and satisfied to them by the defendant, *John Smith*, agreed that the purchase money and interest should be transferred and belong to, and should be received by *Smith*, to his own use absolutely; and upon the faith of such agreement *Smith* acted, and forebore to act, and his position was changed, and a good and valid equitable assignment to *Smith* of the said purchase money was effected; and thenceforward the defendants, *Andrews* ceased to have any, and *Smith* acquired, and had, in equity the whole beneficial interest, right and title to the said purchase money and interest, and all securities therefor; and the defendants *Andrews* became trustees for him of all their interest in the matter, and the transaction was duly communicated to *Riley*, who assented thereto; thereafter the writ of *fieri facias de terris*, in the bill mentioned, was placed in the hands of the Sheriff in the bill named; and thereunder the Sheriff assumed to seize, sell and convey, and the plaintiff assumed to buy, the said premises; and the defendants submit that whether apart from or having regard to the said assignment to *Smith*, the defendants *Andrews* had not, at the time the writ was placed in the hands of the Sheriff, or afterwards, any interest in the

said landssaleable in the view of the Court, and that in the view of the Court, the said pretended sale and conveyance did not alter the rights or position of the several parties, and the plaintiff was a trustee for the party or parties who would otherwise have been entitled thereto, of any legal estate or interest in the said premises, which he had acquired, if any such he did acquire.

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The defendants admitted that, in pursuance and execution of the said contract and assignment, the defendants, *Andrews*, duly conveyed the premises, to *Riley*, and his heirs, and contemporaneously with the execution of such indenture, the defendant, *Riley*, conveyed the premises to *Smith* and his heirs, to secure the payment of the balance of the said purchase money and arrears of interest, and interest; and *Smith* submitted that the execution of the conveyances was legal and proper, and that the plaintiff should be ordered to execute an instrument, vesting in the person or persons entitled under the said conveyances, whatever estate or interest in the same he might have acquired, or that the pretended sale and conveyance thereof to him should be declared void against the mortgage to *Smith* and a cloud on his title, and ordered to be delivered up to be cancelled; that to *Riley* it was indifferent whether the said *Smith* was declared entitled to the purchase money and interest; and he submitted to the direction of the Court, in the premises, and he prayed that, if the plaintiff were declared entitled to the purchase money and interest, the mortgage to *Smith* might be cancelled.

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The answer further stated that the plaintiff had commenced an action of ejectment to recover possession of the said premises from *Riley*; and he submitted that the plaintiff had no right consistently with the allegations of his Bill, or with the truth of the case, as set forth in the answer, to disturb the possession of *Riley*, or to prosecute the said action at law and the suit in equity at the same time; and the defendants prayed that the plaintiff

1866. might be restrained from disturbing such possession, or that he might be ordered to elect between the said action and suit.

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The decree, dismissing the bill of the plaintiff, having been drawn up and entered, the plaintiff appealed therefrom for the following reasons :

1. Because *George Andrews* and *Henry Andrews* were the legal owners of the premises in question, and had a substantial interest therein, when the plaintiff's writ of *feri facias de terris* issued against their lands ; and they also treated the premises as their own, and offered them for sale to a third party, long after the issuing of the said writ, with the knowledge of the defendant *Riley*, who did not then claim to be entitled to a deed of the premises.

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2. Because the alleged parol agreement for a sale of the premises to the defendant *Riley*, if it ever was binding, had been waived by him, before the Sheriff's sale under the said writ, and the plaintiff had no notice of any such agreement till after his said writ issued ; and his learning thereof before the actual sale by the Sheriff, is not set forth in the answer of the defendants ; nor, as the plaintiff contends, did it render the interest of the defendants, *George Andrews* and *Henry Andrews*, unsaleable, under the said writ.

3. Because there is no legal evidence of the alleged assignment to the defendant, *Smith*, of the balance of the purchase money due by the defendant, *Riley*, the evidence of the defendant, *Henry Andrews*, being inadmissible ; and the plaintiff had no notice of any such assignment, even if it were proved.

4. Because the plaintiff's deed from the Sheriff refers back to the time when the writ issued ; and it was duly registered, while the deed to the defendant, *Riley*, and

the mortgage from him to the defendant, *Smith*, were not signed till after the issuing of the said writ, nor was the said deed ever delivered, and neither the deed nor the mortgage have ever been registered.

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The plaintiff therefore claimed that both the said deed and mortgage were void as against him, and that his deed was a valid conveyance of the premises, either clear of any claim thereon by *Riley*, or subject to the equitable right of *Riley* to have the contract specifically performed, upon payment to the plaintiff of the balance of the purchase money still due from *Riley*.

The defendants, in support of the decree, assigned the following reasons :

1. Because *Riley* was in equity the owner of the premises in question, subject to a lien thereon for the purchase money thereof, to the benefit of which lien *Smith* was entitled, and *George Andrews* and *Henry Andrews* were bare trustees of their estate in the premises for the said *Riley* and *Smith*.

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2. Because *George Andrews* and *Henry Andrews* were not the owners of the said premises or of any interest therein, saleable at law, under the plaintiff's writ of *fiery facias*.

3. Because if they had a legal title thereto, apparently saleable at law, yet such their title was not in equity saleable, and the sale thereof would have been enjoined and should be avoided in equity, where the appellant is a mere trustee for the respondents of any legal estate he may have acquired in the premises, and his interest at most is that of a chargee.

4. Because nothing having passed to the appellant by the Sheriff's sale and conveyance, he has not pleaded the Registry Acts, or pleaded or proved the facts neces-

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5. Because the conveyance from the Sheriff, if at all effectual, had relation to the date at which the writ was placed in the Sheriff's hands, and was consequently a conveyance prior and not subsequent to the conveyances to *Riley* and *Smith*, which therefore are not void as against it under the Registry Acts.

6. Because the plaintiff had notice of the rights and interests of the respondents in the premises, and could not cut them out by registration; and if necessary the respondents should and would be allowed to set up such notice, which, however, the appellant admitted in his original bill.

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7. Because the appellant having, by his original bill, stated and insisted on the contract with *Riley*, and prayed specific performance thereof, and having thereafter amended his bill ignoring the said contract, and insisting on his absolute right to the said premises, the said appellant cannot now ask for the specific performance thereof in his favor.

8. Because upon the whole case, and for the reasons appearing, the decree is correct.

The appeal coming on for argument,

*Mr. McGregor*, for the appellant, cited *Doe Jarvis v. Cumming* (a), *Doe Tiffany v. Miller* (b), *McLean v. Fisher* (c), *Bank of Montreal v. Thomson* (d), *Burnham v. Daly* (e).

*Mr. Blake*, Q. C., contra, referred to *Gurnell v. Gard-*

(a) 4 U. C. Q. B. 390,

(b) 6 U. C. Q. B. 428.

(c) 14 U. C. Q. B. 617.

(d) 9 Gr. 51.

(e) 11 U. C. B. 211.

ner (a), *Dean v. Byrnes* (b), *Neil v. Bank of Upper Canada* (c), *Boulton v. Gillespie* (d), *Whitworth v. Gaugain* (e), *Sumpter v. Cooper* (f), *Doe Dougall v. Fanning* (g), *Doe Dempsey v. Boulton* (h), *Wormald v. Martland* (i), *Doe Brennan v. O'Neil* (j), *Thirkell v. Patterson* (k).

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DRAPER, C. J.—The facts necessary to raise the point which we are called upon to decide on this appeal might be shortly stated, but it is perhaps better, on some accounts, to state them fully.

*George and Henry Andrews* were seized in fee of two-fifths of an acre in the village of Waterloo, in the Township of Kingston, under a conveyance dated 20th October, 1857, from one *William Giddy*. This deed, however, had not been registered. The plaintiff recovered judgment against *George and Henry Andrews*, and on the 29th October, 1862, a *fi. fa.* against this land was placed in the hands of the Sheriff, which was renewed for a year on the 28th October, 1863. During that last year the Sheriff sold this land in the usual way, to the plaintiff, for \$350, and executed a deed thereof dated 3d October, 1864, which was registered on the 6th of that month.

Some three or four years before 28th September, 1865, the *Andrews* made a verbal agreement with the defendant *Riley*, to sell him this property for \$600, payable \$100 a year. *Riley* himself swore he went into possession soon after, and it was proved that one of the *Andrews* stated that *Riley* had given him a waggon at \$90 on account. I see no proof that *Riley* contracted to secure the balance of the purchase money by a mort-

(a) 9 Jur. N. S. 1220.

(c) 2 Gr. 286.

(e) 1 Phil. 728.

(g) 8 U. C. Q. B. 166.

(i) 12 L. T. N. S. 535.

(b) 11 L. T. N. S. 97.

(d) 8 Gr. 231.

(f) 2 B. & Ad. 228.

(h) 9 U. C. Q. B. 582.

(j) 4 U. C. Q. B. 8.

(k) 18 U. C. Q. B. 75.

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gage. It would rather appear that, until he paid his purchase money, he was to get no conveyance. He does not appear to have ever got a receipt for the \$90, and, in 1866, he gave a mortgage for \$600, the full contract price. In the fall of 1863 the *Andrews* offered this property to one *Fisk*, a creditor of theirs, to satisfy his claim. *Riley* was then in possession, and *Fisk* told him he was talking about getting the property, and that if he got it he would sell it to *Riley*, who spoke as if willing to buy from *Fisk*. The defendant *Henry Andrews*, was received as a witness for the defendant *Riley*, and swore that he tried two or three times to carry out the sale to *Riley*, but could not get him to do anything at all. That *Riley* might have had a deed at any time, in which case the witness would have taken back a mortgage for the purchase money. *Riley* was also examined, and swore that he was to have got a deed immediately after his purchase; that *Henry Andrews* promised repeatedly he should have it, but always put it off for a day or so, and he never got it; that in 1863 he had further negotiations about a deed. They then wished him to take a deed direct from *Giddy*, but he refused. Up to the time of his examination he had never seen the deed to him. That he had executed a mortgage to *Smith* because he was told that unless he did so he would lose the place, on which he had given a waggon valued at \$90.

It was also proved that on the 13th June, 1864, *George* and *Henry Andrews* executed a deed of the premises to *Riley*, which deed was antedated to 10th April, 1861, and that, on the same 13th June, *Riley* executed a mortgage on the same property to *Smith* to secure payment of \$600 on account of a debt owing by the *Andrews* to *Smith*. *Smith*, on his part, agreed in writing that in case *Riley* should be ordered by any Court of Equity to pay the purchase money to any other person, this mortgage should be avoided.

The plaintiff sought by his bill to have the deed from *Giddy to Andrews* registered, and that it and all other title deeds might be delivered to him, and that the deed to *Riley* from the *Andrews*, and the mortgage from *Riley* to *Smith*, might be declared void as against the Sheriff's deed. His bill was dismissed with costs.

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The objection taken to the admissability of *Henry Andrews* as a witness for the defendant *Riley*, who had been examined for the plaintiff, was rested on the ground of *Henry Andrews*' liability for costs. I do not think the objection sustainable on that ground. It certainly has struck me that his evidence is far more relevant to his own and his partner's defence as well as to that of *Smith*, than to *Riley's*, whose evidence he rather contradicted as to the making a deed. If his being admitted as a witness for *Riley* makes him a witness for all parties, there is no reason for observation; and I understand there is a rule of the Court bearing on the point; still his evidence, besides its want of accordance with *Riley's*, seems, to say the least of it, unimportant for *Riley's* defence, who states in his answer that it is indifferent to him whether the plaintiff or *Smith* be declared entitled to the purchase money and interest. If the former, he only asks that the mortgage to *Smith* may be cancelled.

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But for the purpose of discussing the question of law which this appeal immediately presents, we may lay aside a great part of the facts in evidence. It is enough to say that the *Andrews* were seized in fee; that they made a parol contract to sell to *Riley*, receiving part of the purchase money, and letting him into possession. No evidence was given that it was part of the contract they should make a deed immediately and take back a mortgage—but I assume it for the purpose of the argument. After this contract was made the plaintiff recovered a judgment against them, and in due course issued an execution against their lands, under which the lands in question were sold and conveyed by the Sheriff.



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The plaintiff's right is perfectly clear unless displaced. The burden of proof lies on the defence, and this, as I understand, is rested on the ground that, (as insisted) under the above circumstances, *Riley* became equitable owner, before the property was bound by the judgment and execution, and that his vendors were entitled to a mortgage to secure the balance of the purchase money, and were in equity to be considered and treated as such mortgagees, and that as the right and interest of a mortgagee at law cannot be taken and sold under an execution against lands, no more can the legal estate, when the holder of it is in equity only a mortgagee; being under a binding contract to convey the legal estate to the purchaser, taking back a mortgage.

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If a conveyance had been executed to *Riley*, without a mortgage given for the unpaid purchase money, the *Andrews* would still have had an equitable lien on the land for the amount, but, as the case stood, they retained the legal estate subject to the equities arising out of the contract. That they had a beneficial interest is not questioned, and I cannot understand why the judgment creditor cannot sell the legal estate, subject to and with the benefit of the existing equities, and by becoming the purchaser entitle himself to the money to be paid by *Riley*, or to the land if *Riley* does not complete the purchase. The case of *Strong v. Lewis* (a), though dissimilar in some important particulars, nevertheless appears to me to support this conclusion: there the plaintiff was the executor of the vendor, who had sold the land to a third party, but had received no part of the purchase money. A creditor of the vendee having a registered judgment, sold the land under a *fi. fa.*, and the defendant purchased, and the vendor's lien for the purchase money was enforced against the defendant, who purchased with notice. The judgment certainly is rested on the ground of notice, but there are expres-

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(a) 1 Grant, 443.

sions and arguments in it tending strongly to the conclusion that the conveyance by the Sheriff would have passed the property subject to all existing equities against the debtor. Here the vendors are the debtors, against whom the judgment is recovered. They have contracted to sell, but the legal estate remains in them, and the greater part of the purchase money is unpaid. I see no reason why the legal estate may not be sold subject to the equities in this case, which might not have been equally urged in the other.

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The case of *Chisholm v. Sheldon (a)*, afterwards decided in the Court of Appeal, and the case of *Waters v. Shade (b)*, establish that by a Sheriff's sale of the reversion in fee expectant on the determination of a long mortgage term, the right to redeem will pass also. I do not perceive that the equity of redemption of the term is more closely united to the reversion in fee than the lien for unpaid purchase money of land sold but not conveyed, is connected with the legal estate still in the vendor. In either case the two things may be separately disposed of, but, till some such disposition, the conveyance of the reversion in the one case, of the legal estate with notice to the purchaser in the other, would, I apprehend, pass the equity of redemption or the right to the purchase money.

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But assuming a binding contract proved, such as the defendants contend for, the question arises whether the legal estate is so affected as to be placed beyond the reach of a common-law execution against the *Andrews*. The time of the making the contract is not precisely fixed; it would seem to have been in 1861, in which year the failure of *Irons* is stated to have involved the *Andrews* in difficulty, to which, after eighteen months' struggle, they succumbed, and *Henry Andrews* swore that the bargain to assign over to *Smith* their claim upon

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(a) 2 Grant, 178.

(b) 2 Grant, 457.

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I understand the decision of his Honor, Mr. V. C. *Mowat*, to be rested on this ground: that the *Andrews* were bound by contract to convey to *Riley*, who was bound to reconvey to them by way of mortgage; that in the view of a Court of Equity *Riley* thus became equitable mortgagor, and the *Andrews* equitable mortgagees, and, inasmuch as if they had been legal mortgagees their estate and interest would not be saleable under a *fi. fa.*, so neither can the land of which they are equitable mortgagees be sold, though they are seized of the legal estate. There is some analogy between the cases, but to me it appears imperfect, and the possible mischief of such a determination is, in my humble judgment, so apparent that I should, even under the pressure of the most direct authority, reluctantly adopt the conclusion. I have not, however, found any such authority.

Jndgment.

At law, under the Consolidated Statutes of Upper Canada, chapter 22, section 257, the estate and interest of a mortgagor of real estate can be sold under a *fi. fa.*, but it is clearly held that a mortgagee's estate and interest is not so liable. I do not suppose that it will be contended that we should construe this enactment as authorizing a sale of the interest of *Riley* as a mortgagor, at all events under a legal execution. Then the effect of this decision is, that a debtor seized of real estate can, by entering into a *bona fide* contract for its sale, while he has received only a small part of the price, deprive his creditors of all common law remedy against such estate, provided that, by the terms of the contract, he is to convey, and to have his purchase money secured by mortgage. Such a contract, if taken out of the statute of frauds by part performance, as in the present case, may be by parol only. I am aware that it is held in England that the

registry acts do not apply to equitable mortgages, because they may exist when there is only a lien, or be created by the deposit of title deeds, and, therefore, there is no instrument to be registered. But it may be observed that registration in England is exceptional—limited to Middlesex, the North, East, and West Ridings of York, Kingston-upon-Hull, and the Bedford Levels. It is rendered necessary, not by one general act, but by several, for these several places, and the provisions are not in all particulars alike. But the policy of our Legislature has, in Upper Canada at least, from a very early period, wisely, as I humbly conceive, established registration as the rule, commencing at a time when titles were very simple and free from complications, and down to the most recent enactment extending the rule by making its application more general. I confess that it appears to me that the leaning of the Courts should be to give the fullest effect and extension to the principle, and to afford no encouragement to any evasion of its salutary provisions.

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It is, however, unnecessary to pursue this discussion, as I have arrived at the conclusion that, in fact, the *Andrews* had parted with their interest in the unpaid purchase money due by *Riley* to the defendant *Smith*, before the plaintiff's execution could bind their lands or their interest in them. It seems to make no difference that the assignment was by parol. The cases of *Burn v. Carvalho* (a), *Tibbits v. George* (b), *Young v. Neill* (c), and *Gurnell v. Gardner* (d), are all authorities on that subject.

I am compelled to rest this conclusion upon the testimony of *Henry Andrews*, and the admissibility of that evidence to support the defence set up by *Smith*. However strong the objection might be, if the result of this

(a) 4 M. &amp; Cr., 690.

(b) 5 A. &amp; E., 107.

(c) 9 Jur. N.S., 976.

(d) 9 Jur. N. S., 1220.

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decree would be to benefit the *Andrews*, it seems to me that the whole question now at issue is: which of two other creditors has the prior and better title to the money—and that *Henry Andrews* is a perfectly competent witness for that purpose. The case of *Jeffs v. Day* (a) shews that *Riley* (before he got the deed and gave the mortgage), could have successfully resisted at law any claim of the *Andrews* upon the ground of their having assigned to *Smith*, by plea upon equitable grounds; and the principle there recognized is the same as that upon which *Smith* claims the purchase money. No doubt all this doctrine of equity is, to some extent, inconsistent with the supposed intention of the Registry Act, that a search there should disclose the true state of every title and of every incumbrance affecting it—but any change in this must come from the Legislature.

RICHARDS, C. J., and HAGARTY, J., concurred.

Judgment

A. WILSON, J.,\* concurred in dismissing the appeal, at the same time expressing a doubt if the interest of a vendor in real estate, after a contract for the sale thereof, could be sold by the Sheriff under common law process.

J. WILSON, J., concurred in the views expressed by His Lordship the Chief Justice.

MOWAT, V. C.—The question, whether a creditor can sell a vendor's interest under an execution against his lands, depends on the true construction of the Statute 5 George II. chapter 7 section 4, viewed in the light of the decisions of the Courts hitherto. As an Equity Judge, I have no more right to disregard the intention of Parliament or the decisions of the Courts, than a Common Law Court has. If there are examples both at law and in equity, in times long past, of statutory enactments hav-

(a) 1 Law Rep. Q. B., 372.

\* MORRISON, J., was absent holding the Toronto Assizes.

ing been unjustifiably interpreted away, and in effect repealed, by judicial construction, these are examples not now to be followed, but on the contrary, to be carefully avoided.

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My judgment in the Court below proceeded on the authority of the long settled doctrine that the interest of a mortgagee is not saleable under execution. This had been laid down by the Court of Queen's Bench in the unreported decision to which I referred (a), and was long afterwards stated by *Sir John Robinson* in his judgment on an appeal from the Court of Chancery (b). His Lordship observed: "It has been decided in England, and we have followed the decision here, that the estate of the mortgagee cannot be sold upon a *fi. fa.*" The same rule has been laid down in most or all of the American State Courts (c).

What is the ground of all these decisions? It is stated by the Court in *Smyth v. Simpson* (d); and will be found to have no reference to the form of the transaction, or to there being a deed purporting on the face of it to be a mortgage. This is the language of the learned Chief Justice: "Because, in reality, the extent of his interest is only to hold the estate until he is satisfied the debt, which in general is secured by a bond taken at the same time; and the effect of selling, as his, the only substantial interest which he really does hold, would be to separate the securities, and place the estate in the hands of one person, while the debt would remain in another." His Lordship afterwards stated the reason in these terms: "Because he (the mortgagee) is not really and in substance the owner, but only in form, as a means of compelling payment of a debt secured upon it, which is his only valuable interest in the land."

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(a) *Doe Thompson v. Campbell*, Hil. 6 Vict.

(b) *Smyth v. Simpson*, 2 Gr. 386.

(c) See 4 *Kent's Com.*, p. 166 n. (a), and cases there cited.

(d) *ubi supra*.

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Every word of this is as applicable to the case of a vendor who has not conveyed, as to a mortgagee. Like a mortgagee, he has a right to retain the legal estate so long only as the debt for the land remains unpaid. His real interest in it is the debt due—nothing more; and the effect of the sale, if permitted, would not be to pass to the purchaser the right of suing at law for the debt, any more than in case of a formal mortgage. In a word, in whatever sense the language of the learned Judge is correct in reference to the case to which he was alluding,\*it is equally correct as to the case here.

Acting on the principle of these decisions, the Court of Chancery, when it consisted of Chancellor *Blake*, the late Vice-Chancellor *Esten*, and my brother *Spragge*, in *Neil v. The Bank of Upper Canada* (a), restrained a sale by the Sheriff where the execution debtor held an absolute conveyance, but had executed a separate instrument by way of defeasance.

Judgment.

In truth, nothing can be more clear than that, to create a mortgage, the execution of a formal instrument purporting to be a mortgage is entirely unnecessary. There may, for example, be a mortgage by mere deposit of title deeds, without any instrument whatever. "What is a mortgage?" as Sir *Thomas Plumer* asked in *Quarrel v. Beckford* (b). The learned Judge answered his own question: "Everybody knows it consists of two things; it is a personal contract for a debt, secured by an estate; and in equity, the estate is no more than a pledge or security for the debt; the debt is the principal, the estate is the accident." A vendor's interest, in respect both of the purchase money and the estate, falls with all exactness within this definition. It is treated of in text books, both English and American, as constituting one class of mortgages. Thus, in *Miller on Equitable Mortgages* (c) we have this observation: "In this

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(a) 2 Grant, 386.

(c) P. 4.

(b) 1 Madd.

description of mortgages may also be included the liens of vendors for unpaid purchase money, and of purchasers for advances on account of their purchases." So, in *Trower* on Debtor and Creditor (a) the subject is introduced with the following sentence: "Another species of equitable mortgage is a vendor's lien on the land sold for his unpaid purchase money." In *Hilliard* on Mortgages there is a chapter on the subject of such a lien, and the first paragraph contains the following observations: (b) "This lien may properly be treated as a mortgage, both because an express mortgage, as has been abundantly shewn in the foregoing pages, according to the established modern doctrine on the subject, creates no higher interest than a lien; and because the mode of enforcing the lien in question, and the general rights and remedies incident to it, are substantially similar to those created by an express mortgage. It has already been remarked that one of the most common occasions for executing a mortgage occurs where a conveyance of land is made, and a mortgage of the same land at the same time taken back by the grantor to secure the whole or a part of the purchase money. The lien to be considered in the present chapter, is a title substantially corresponding with that created by such a mortgage, but arising by implication merely, and not depending upon any deed or written instrument whatever."

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Riley.

Judgment.

In *Attorney-General v. Brunning* (c) the Court of Exchequer had to deal with the case of unpaid purchase money of land sold by a testator in his lifetime, but not conveyed; and endeavored to distinguish such an interest from other descriptions of personal estate which were liable to probate duty. That mortgage money was so liable there was no dispute; but the Court of Exchequer held that unpaid purchase money, before conveyance, was equitable and not legal assets, and was on

(a) P. 342.

(b) Vol. 1, P. 463.

(c) 4 H. &amp; N. 94; 8 H. L. 423. S. C.



1866. that and other grounds not liable. But the House of  
 Lords reversed the decision. In the judgments in the  
 Court below, and in the arguments of counsel there and  
 on the appeal, much learning and acuteness were displayed in making out the distinction contended for; but all the Lords who took part in the decision, namely, Lords *Campbell*, *Cranworth*, *Wensleydale*, *Chelmsford*, and *Kingsdowne*, were unanimous that the distinction could not be sustained. The Lord Chancellor (Lord *Campbell*) in his judgment observed: "Money due on mortgage has always been considered as personal estate. \* \* Mortgage money recovered by an executor by the aid of a Court of Equity, would certainly be assets and liable to probate duty. And I am unable to distinguish between mortgage money and purchase money recovered in the same manner. So the question seems to me to stand upon principle." Lord *Chelmsford* said: "We may adopt the language of the Master  
 Judgment. of the Rolls in *Lewis v. Bennett* (a), and say, 'It is very clear that if a man, seised of a real estate, contract to sell it, and die before the contract is carried into execution, it is personal property of him.' It certainly seems extraordinary that property which is recoverable by the executor *virtute officii*, which belongs to the next of kin, and not to the heir at law, and which has the character of personalty thus impressed upon it *in every other respect*, should lose that character solely in relation to fiscal liability. It is difficult to understand upon what principle the conversion into personalty is to stop short of this point."

In truth, the more fully the two interests are considered—I mean that of a mortgagee and vendor respectively—the more clear does the impossibility become of drawing any substantial distinction between them. A mortgagee, after default, is the absolute owner

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(a) 1 Cox. 171.

of the legal estate; but in equity is regarded as holding it as a mere pledge for his debt. On his death, the legal estate will not pass except by a will executed like other wills of real estate, but the debt will pass by a will executed so as to pass personal estate. If he dies intestate, the land goes to his heir; but his heir is a mere trustee for the executor or administrator, and subject thereto for the mortgagor. Now, every one of these incidents belongs equally to the case of a vendor who has not been paid his purchase money, and to his representatives. So, in the case of either, if the debt remain unpaid after the death of the party entitled to it, and the mortgage is in consequence foreclosed, or the contract rescinded, and the interest of the other party in the land thereby determined, not the heir, but the personal representative, of the mortgagee or vendor, becomes entitled beneficially to the land.

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Riley.

On the other hand, the purchaser and mortgagor are in the same position. The legal and equitable incidents of the transaction, as they affect them respectively, are the same. Equity looks upon things agreed to be done as actually performed, and accordingly, as pointed out by Lord *Eldon*, though "at law the estate remains the estate of the vendor; and the money that of the vendee; it is not so here. The estate from the sealing of the contract, is the real property of the vendee. It descends to his heirs; it is devisable by his will; and the question whose it is, is not to be discussed merely between the vendor and vendee, but may be to be discussed between the representatives of the vendee." (a)

Judgment.

It is unnecessary to pursue these observations further; for, in brief, it may be said that all the legal and equitable incidents of the estate of a mortgagee and vendor, as these have been settled for centuries, are the same; as well as those of a mortgagor and vendee.

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(a) *Seton v. Slade*, 7 Ves. 274.

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Looking at the statute (a) without reference to the express decisions upon it, I see nothing in it indicative of an intention to authorise the sale under *fi. fa.* of the interest of mortgagees, vendors, or others standing in a like situation. It is quite certain that the Act did not make all descriptions of interest in real and personal estates saleable. Some kinds of property not affected by it have accordingly been made saleable under execution by subsequent Provincial statutes (b); and other particulars have been made available to a judgment creditor by enabling him to garnish them (c); and there are valuable claims and interests of a debtor which no statute yet passed enables his creditor to reach.

Judgment.

By the Imperial Act referred to, a debtor's real estate in the Colonies was rendered liable to debts of every kind or nature, and was made "assets for the satisfaction thereof in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond or other specialty." The statute thus placed all debts on the same footing as bond debts. By the English law as it stood at this time, a creditor by specialty, wherein the heirs were bound, was entitled, after the death of his debtor, to execution of the whole of his debtor's lands, instead of a moiety to which other creditors were confined. The statute abolished this distinction; and the first clause of the 4th section did no more than this.

The second clause plainly does not affect, and was not intended to affect, personal estate, or a creditor's remedies in respect of personal estate. What it enacts is, that the real estate of the debtor "shall be subject to the like remedies, &c., as personal estate." When

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(a) 5 Geo. 2, Ch. 7.

(b) Consol. U. C. Ch. 22 (Com. Law Procedure, Act 1869), Ss., 255, 257, 260, 261, 22 Vic Ch. 90, Ss., 11.

(c) 22 Vic. Ch. 52, Sec. 288 et seq.

this Act was passed, the law of England was the law of most of the Colonies; and by this law, the creditor could extend or sell the debtor's goods and chattels for any debt; but he could only take the profits of the real estate (or a moiety of the real estate, as the case might be), and continue in receipt of them until the debt was paid. The second clause I have quoted abolished this distinction, and gave creditors the same remedies in regard to real, as they had in regard to personal estate. This, and nothing more, was the plain object and manifest effect of the statute.

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Now, what I had to deal with, on the hearing at Kingston, was an attempt to sell land which the debtor once owned, but which in equity had, before the writ was placed in the Sheriff's hands, ceased to be the estate of the debtor, and in which his only interest was as a security for the unpaid purchase money. Was this real or personal estate? If it was personal estate, the statute clearly did not apply to it; and that it was personal estate, and not real estate, there is no room whatever for controversy. Judgment.

Having reference to all these considerations, and the authorities I have quoted, it seemed to me impossible, without making a most arbitrary decision (*a*), to hold that the interest of a vendor, in respect of unpaid purchase money, was saleable under the Act. (*a*) So to hold, I venture to think, would have been legislation, and not authorized judicial construction.

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(*a*) *Whitworth v. Gaugain*, 3 Hare, 426, 429, 1 Ph., 728 S. C.

(*b*) *Cosherd v. Attorney-General*, 6 Pri. 462, 463.



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[*Before the Hon. Sir J. B. Robinson, Bart., President, The Hon. P. M. VanKoughnet, Chancellor, The Hon. W. H. Draper, C.B., C. J. C. P., The Hon. V. C. Esten, The Hon. Mr. Justice Richards, The Hon. Mr. Justice Hagarty, and The Hon. Mr. Justice Morrison.*]

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ON AN APPEAL FROM THE COURT OF CHANCERY.

THE BANK OF MONTREAL V. THOMSON.\*

*Mortgage—Sale under fi. fa. issued on registered judgment.*

Land subject to two mortgages was sold for 20s. under a writ of *fi. fa.* issued on a prior registered judgment, and the purchaser subsequently bought up the first mortgage. The holders of the second mortgage having filed a bill, praying foreclosure, on the ground that under the circumstances the purchaser at Sheriff's sale was bound to pay off both mortgages; the Court refused this relief, and on appeal the decree was affirmed.

This was an appeal by the plaintiffs from a decree of the Court of Chancery reported in the ninth volume of the reports of that Court, p. 51, where the facts sufficiently appear, on the following, amongst other, grounds: namely, that upon the whole case the plaintiffs had acquired a priority over, and a right to be redeemed by the defendant, and the decree should have so provided; that the defendant did not set up or plead the acquisition at the Sheriff's sale in the pleadings mentioned of any other estate than an equity of redemption, or of any such estate as he is adjudged to have acquired, but on the contrary, admitted both by his pleading and his acts that the estate so acquired by him was an equity of

Statement.

\* This case should have appeared in the 2nd volume of these Reports, but the judgment of the President was mislaid at the time that volume was issued.

1866. redemption ; that the sale by the Sheriff was manifestly treated by the defendant as a sale of an equity of redemption, and the defendant could not under such circumstances insist on such a sale at such a price as a sale of the fee simple ; that the defendant admitted that he purchased an equity of redemption, and based his resistance to the plaintiff's claim simply on an alleged right as such purchaser to be redeemed in respect of the said mortgage to *Stanton* [the first], in the pleadings mentioned, and this position being untenable the defendant should be ordered to redeem the plaintiffs, and should not be allowed to insist on the position awarded to him under the judgment and decree ; that in fact the estate acquired by the defendant at the said sale was an equity of redemption ; that there is no proof, or no proper proof that the writ under which the defendant purchased was issued upon a registered judgment, or that such judgment was properly registered, or that the lands in question were subject to the operation of the registry laws, and because the writ was not issued within the proper time, and was not properly kept alive ; and even assuming all the necessary facts to be proved, the writ did not relate back to the registration of the judgment under which the same was issued ; and that the defendant in his purchase of the said estate, and by reason also of the conveyance from *Shaw* to him, became liable and bound to pay off the plaintiffs' mortgage, as well as the mortgage to *Stanton* in the pleadings mentioned.

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Statement.

Mr. *Blake* for the appellants.

Mr. *Proudfoot* for the respondent.

The cases cited appear in the report of the case in the Court below and in the judgment.

SIR J. B. ROBINSON, Bart., President.—I see no ground upon which it can be seriously contended that

the plaintiffs are entitled to be redeemed by the defendant *Thomson* in respect of the mortgage made by *Shaw* to *Gillespie* for £160, which the plaintiffs hold ; and this is the only question in the case.

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Assuming that *Benner's* judgment against *Shaw* and *Barrett* was duly registered in the County of Norfolk on the 11th July, 1857, as it appears to have been, the effect of the registration under the statute 13 and 14 Vic., ch. 63, then in force, was that, from that day the judgment so registered operated as a charge upon *Shaw's* lands in that county of which he was seized on the day of registration : that is, it operated upon and bound the estate which he then held in any such lands : and bound him and all persons claiming under him after the judgment and registry, and (sec. 4) must be deemed and taken to be "good and effectual," that is a good and effectual charge or lien, "*both in law and in equity* according to the priority of the time of registering the certificate."

Judgment.

I take the effect of the last provision to be that it was not competent to *Shaw* after the 11th July, 1857, to make any alienation, or create any incumbrance, which could impair or affect the remedy which the judgment creditor on that day was entitled to take for the satisfaction of his judgment. He was placed by the act of registration in the same situation in regard to *Shaw's* lands, as he would have been in regard to his goods if he had on that day placed a *fi. fa.* against his goods in the hands of the Sheriff. It cannot be held, I think, against the plain words of the statute, that the judgment when registered was not to operate as a lien in favor of the judgment creditor as regarded his legal remedy, and that because a convenient remedy was opened to him by the latter part of the second clause, he was therefore confined to such remedies as he could obtain in a Court of Equity on the footing of an incumbrancer.



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We must look upon the remedy given in equity as cumulative not exclusive.

I am indeed not certain that the person, who framed the statute, was not led to allude to remedies in equity in the latter part of the second clause under the idea (though it would indicate some degree of confusion in his mind) that the operation and effect of the lien would be extended by referring in the words used to the principle in equity, which for many purposes treats a thing intended and "required" to be done as if it were done; that, however, is a mere conjecture on which I lay no stress.

Judgment.

That the Legislature intended and have made the registered judgment operate as a lien upon the lands as well for the purpose of legal as of equitable remedies is not only apparent, I think, on the face of the second and fourth clauses, but may be as plainly inferred from the first clause where it is provided that any judgment to be hereafter duly certified and registered, shall affect and bind the lands, &c., in like manner as a judgment of any of Her Majesty's Superior Courts at Westminster, when duly docketed, would have bound lands before the practice of docketting judgments had been discontinued in England.

Now how did docketed judgments bind lands in England under 4 and 5 William and Mary, ch. 20? Certainly not for the purpose of equitable remedies only, but with a view to legal remedies equally if not principally.

It was suggested in argument that by this reference in the statute to the manner in which judgments in England when docketed used to bind lands, they can only be held bound here for the purpose of a writ of *elegit*, and not of a *fieri facias* for sale, because lands in

England were never subject to be sold on a *fi. fa.* upon the docketted judgment. I am satisfied, however, that the reference was made with no such view, and meant no more than this; by the law of England lands were at one time bound from the entering of the judgment, so that the execution by which satisfaction was to be obtained would overreach all intermediate alienations or incumbrances, but that was found to lead to cases of great hardship upon purchasers, mortgagees, and creditors, because no convenient means had been provided by which such purchasers, &c., could readily and certainly ascertain the existence of judgments and their amount, &c., and therefore by statute 4 and 5 William and Mary, ch. 20, the Legislature required judgments to be regularly docketted, so that purchasers and others, by the help of an alphabetical index, could readily ascertain by search whether there were any judgments in force against the owner of any particular real estate, and having thus secured the means of a convenient search, the Legislature provided, in England, that lands should not be bound by a judgment, until the day on which it had been so docketted.

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In Upper Canada, on the other hand, it had been adjudged at an early period that lands were not bound from the entry of the judgment, or from its being docketted, but only from the time that a *fi. fa.* against lands had been delivered to the Sheriff; because the British Statute 5 Geo. II. ch. 7, sec. 4, had made lands in the American plantations liable for all just debts owing by any person to his Majesty, or any of his subjects, and had also made them subject to the like remedies and process in any Court of Law or "Equity, for seizing, extending, selling or disposing of them towards the satisfaction of such debts, &c., and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts;" and their being subject to the

1866. same process and in the same manner as goods, it has been uniformly held in Upper Canada that lands like goods were not bound till the delivery of the execution against them to the Sheriff (a).

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This exposed the judgment creditor, however, to the danger of having his remedy defeated by alienations, or incumbrances between the entry of the judgment and the delivery of the writ to the Sheriff, and to prevent that inconvenience our Legislature, by 9 Vic. ch. 34, and 13 and 14 Vic. ch. 63, thought proper to take the middle course, adopted in England by 4 and 5 William and Mary ch. 20, substituting registration in the county register for docketting in the Courts, and all they meant by their reference in the act to the former practice of docketting in England: was, that lands shall neither be bound by the mere entry of the judgment or by relation to the term, as they once were in England (which was dangerous to purchasers and others); nor only from the time of delivering execution against them to the Sheriff, as was the case till then in Upper Canada (which was dangerous on the other hand to the judgment creditor); but that the judgment should be registered in the register of the county were the lands to be affected lie, and that from the time of such registration they should be bound here, as they used to be bound from the time of docketting in England, while docketting was practised there.

Judgment.

They did not mean, I am persuaded, to make registration operate as a charge only for the purpose of an *elegit*, and not for sale under a *fi. fa.* because *elegit* was then the execution resorted to in England; but meant to leave us in possession of our ordinary remedy for

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(a) Doe dem. Updegrove v. Clark and Street, 4 U. C. O. S. 197; Doe dem. McIntosh v. McDonell, 4 U. C. O. S. 195; Doe dem. Auldjo v. Hollister, 5 U. C. O. S. 739.

sale of lands in execution, just as before; having thus defined in effect that the real estate to be sold should be such as the debtor owned when the judgment was registered, or at any time afterwards.

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As to the process of *elegit*, it was made a question at the first establishment of our Courts of Justice whether the English Act, 5 Geo. II. ch. 7, for the sale of real estate in execution was in force here, *first*, because Canada was at the time of its passing one of the Colonial possessions of the Crown, not a British plantation in America; and next, because our Legislature established under the British Statute, 31 Geo. III. ch. 31, had adopted the law of England; which adoption it was contended gave us the English process of execution upon judgments between party and party, and confined us to that. That question, some time about 1800, was carried to England by appeal in a case of *Gray v. Willcocks*, when it was determined that the 5 Geo. II. ch. 7, was binding upon us, as upon other colonies. During the short time that a doubt prevailed, there may have been a writ of *elegit* sued out, and I think in one case there was, but, I believe, I am quite safe in stating that in the sixty years since the judgment of the Privy Council in *Gray v. Willcocks*, no *elegit* has ever been sued out here. Whether a creditor can proceed here by *elegit*, has been not even seriously discussed, though it has been incidently touched upon in two or three cases, as in *Doe dem. Henderson v. Burtch* (a), and *Doe dem. McIntosh v. McDonell* (b).

Judgment.

If it had been held that the statute, 5 Geo. II. ch. 7, does not shut out the process by *elegit* in any colony where that form of execution had been adopted, it would by no means follow, that the creditor could not sell the lands by *fi. fa.* if he chose, as he would be sure to do,

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(a) 2. U. C. O. S. 514.

(b) 4 U. C. Q. S. 195.

1866. that being obviously the better remedy, and the decision of that case therefore cannot turn upon the question which form of writ might have been taken out ; for whatever was the description of execution resorted to, if it was sanctioned by law, the lien by judgment registered would be available with a view to the one, as well as to the other.

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Judgment.

I take it to be clear of any doubt that the judgment creditor (*Benner*) in this case acquired a lien by his judgment from the 11th of July, 1857, when it was registered, which lien, however, did not constitute *per se* a right or property in the land itself, but only a right to levy on the same under the *fi. fa.* to the exclusion of other adverse interests subsequent to the judgment registered, so as to cut out intermediate incumbrances (a). But subject to that right the debtor has power to sell, or mortgage his land. His deeds for that purpose will not be void in themselves, though they will not be suffered to interfere with the judgment creditor's execution against the lands for the satisfaction of his debt. Both of the mortgages made by *Shaw* were subsequent to the registration of the judgment. The first of the two, that made to *Stanton*, was made for no purpose adverse to the judgment creditors, but was intended to be in aid of their judgments. *Benner* being advised probably that his debt being small, and his judgment being the first registered, he had better pursue his judgment and have nothing to do with the mortgage, he declined taking any benefit under it, and so stood like any stranger to the mortgage. The plaintiffs have no interest, however, in that mortgage, and no question arises under it, but only in respect to the latter mortgage made by *Shaw* to *Gillespie*, which the plaintiffs hold as assignees, and which they contend *Thomson*, the defendant, is

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(a) *Conrad v. The Atlantic Insurance Co.*, 1 Peters S. C. Rep 441.

bound to redeem. But how bound? The land could not properly have been put up by the Sheriff subject to that mortgage, for in fact it was not, till *Benner's* judgment was satisfied, and indeed all other judgments that were registered before the mortgage was made, of which there were many.

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It does not appear in evidence that the Sheriff sold *Shaw's* interest as an equity of redemption, subject to both or either of the mortgages. It would have been satisfactory to us to know whether he did take upon him to describe what *Shaw's* interest was, or merely sold all his interest whatever it might be. There is absolutely no explanation on the subject, though the Sheriff, or his officer, or the auctioneer, could have given it. Though *Thomson* was called he was not asked to explain how the property came to be bid off for one pound.

Judgment.

The plaintiffs in their bill state that the Sheriff sold to *Thomson* under execution all *Shaw's* equity of redemption, but that is merely begging the question. The Sheriff's deed says nothing of an equity of redemption, but assumes to convey the land itself, and all *Shaw's* undivided interest in it, and the recitals in the deed are in accordance. There is no evidence de hors the deed of what the Sheriff did expose to sale, or that any thing was said or known of the mortgages at the sale. *Thomson*, we can hardly doubt knew of the judgments, and of one, or both of the mortgages at the time of the sale in October, 1859; they had been both registered long before. Under the circumstances that appear in evidence the land should have been put up simply for what it would fetch, with no regard to anything but the question of what the bystanders might think it worth, for the mortgages could not either of them be set up against *Benner*, as incumbrances for which allowance was to be made in bidding, neither could the other judgments, for

1866. they were subsequent to his. The land should have been sold for what it would bring without reference to either, as being capable of affecting its value, and then it would have rested with the Sheriff to pay off *Benner's* judgment out of the proceeds, and to dispose of any surplus as he might be advised.

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If Mr. *Thomson* said or did anything that led to the land being bid off at a trifle from a misconception of the true state of things, whether he acted ignorantly or by design, the sale would have been set aside on a proper application.

Judgment.

The judgments, however, except *Benner's*, seem to have been since satisfied ; when, or by whom does not appear, but I infer by *Thomson*, after he became the purchaser of the land. Whether *Shaw's* interest in the land was really worth anything more than the amount of the judgments we are not told ; if it was not, it would seem strange that *Gillespie* would have advanced £160 upon it, after all the judgments were registered ; though if he made no loan but only took his mortgage, as something that might help to secure a prior existing debt, the land might, or might not be, worth more in fact than the previous claims upon it, which *Thomson*, as I suppose, has arranged. If the land is really worth no more than the amount of the judgments, then no wrong has been suffered by *Shaw* from its selling at so little at Sheriff's sale, nor by any one else, except perhaps by *Benner*, for the other judgment creditors seem to have been content to take what was given to them for their judgments ; and when they were satisfied *Stanton's* mortgage was satisfied ; except as to any amount that *Thomson* may have expected to make out of it, beyond what the judgment creditors received as a full settlement. He seems to have bought up the judgments, probably at a great reduction from their nominal amount, and then took an assignment of the mortgage

from *Stanton* as a means, I suppose, of getting the whole amount, if the land would produce it, having before that, at Sheriff's sale, bought up all *Shaw's* interest, which, if the *fi. fa.* was correctly framed, would be his interest on the day of registering the judgment ; so that he held the legal estate paramount the mortgage to *Stanton*, if the land was put up as it ought to have been, and nothing appears in the evidence to shew that it was not. Yet he got an assignment afterwards of the mortgage, with assent of the judgment creditors. We can easily see why he should have thought it quite reasonable and expedient to do this, having paid the judgment creditors the amount which they were willing to receive in discharge of their judgments which that mortgage was intended to secure. But it is only about the later mortgage for £160 that any question arises in this cause, of which mortgage the defendant *Thomson* may or may not have been aware, when he bought at the Sheriff's sale.

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Judgment.

At that time both the mortgages, as well as the certificates of the two judgments, were registered in the County Register, and had been many months before. The Sheriff, therefore, as well as the defendant and every person present at the sale had means of knowing the true state of the title, though whether any of them knew of the other judgments and the two mortgages does not appear. I should hope that Mr. *Thomson*, who is an attorney, was not professionally concerned in obtaining the judgments, which he afterwards purchased : nothing appears in the evidence to connect him professionally with them.

If the Sheriff, or those superintending the sale, knew nothing at the time of the mortgage to *Gillespie*, then they could not have spoken of it at the sale, and there would be no pretence for saying that the sale instead of being as the deed imports a sale of the legal fee in the



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land, was a sale of an equity of redemption, in which case the purchaser must have understood that both the mortgages were treated as part of the price to be paid; and the sum bid was understood to be what the bidder was willing to give over and above these as the worth of the equity of redemption.

Judgment.

If, on the other hand, the Sheriff was aware of both the mortgages, and the facts attending them, and stated the nature of the title truly, he must then have known that he could not properly put up the estate he was to sell, as an equity of redemption remaining after both those incumbrances, for he would by that course have been giving priority to the mortgages to the prejudice of the creditor whose judgment was registered before they were made. So that either way we require, before we can believe it, to have it made out by clear evidence, that happen how it might, it was the equity of redemption that was in fact put up and sold, and that *Thomson* bought upon the understanding that he was to pay off both the mortgages, and therefore made allowance for both in his bid, for no such presumption can arise from the mere facts and dates that are before us, but directly the contrary.

On the plaintiffs' side stress has been laid on *Thomson's* subsequent conduct in taking from *Stanton* an assignment of the first mortgage, manifesting, as the plaintiffs contend, a consciousness on his part that it was an equity of redemption only that he bought, and that besides the £1 he bid, he was under the necessity of redeeming that mortgage.

But we must consider how that mortgage was identified with the judgments. It was only by what he paid to *Stanton* as trustee for the judgment creditors, that he paid the consideration (whatever it was) which he did agree to give for the judgments. If he had not paid

that he would have acquired the land for the pound he paid, but having thus placed himself in the position of the judgment creditors, he seems to have thought, naturally enough, that he could call for an assignment of the mortgage. It probably was part of his bargain that he should have it, and he looked to that, I suppose, as the means of enforcing full payment of the judgment debts, though he had bought them at a large discount.

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All that, however, supplies no information, and can lead to no inference respecting the other mortgage for £160 which the plaintiffs now hold. That, for all that appears, had nothing whatever to do with the judgments, and was a wholly distinct transaction. The defendant, however, may have had no concern in it, and no knowledge of it. It stands on the pleadings and evidence as a transaction with which *Thomson* had no concern, and of which he had no knowledge, through the registry or otherwise; and if he did know the particulars of that mortgage, he must have known also that it could not come before *Benner's* execution, and that he could not therefore be considered as buying subject to it, for it was the Sheriff's duty to sell, and he was entitled to suppose he was buying *Shaw's* interest as it stood on the 11th July, 1857, when *Benner's* judgment was registered, not as it stood after the 13th of May, 1858, when he mortgaged to *Gillespie*. There is a great want of particularity in stating dates as well in the pleadings as in the evidence, and we do not see when *Thomson* may have first entertained the idea of speculating in these judgments, he may have been so far committed to the negotiation at the time of the Sheriff's sale even, as to make it natural that he should look to the purchase of the judgments as the substance of the transaction, and his bidding off the land at Sheriff's sale, as merely an advantage subsidiary to it which might place him on better ground for obtaining what he had in view, that is the full amount of the judgments.

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Upon the argument his counsel stated that the defendant did not care for holding on to his purchase at Sheriff's sale, and was willing to give that up, if his mortgage was redeemed. This shews what alone it is that he has been looking to, and that what he has done, or is willing to do, in regard to the one mortgage, affords really no argument for determining what he is bound to do, and can be made to do, in regard to the other.

Judgment.

As respects the £160 mortgage, it is to be considered that it was made more than a year after *Benner's* judgment was registered, under which *Thomson* bought; that the Sheriff (as his deed recites) seized and sold the land, and all *Shaw's* interest in it upon a *fi. fa.* to satisfy that judgment, and conveyed it to *Thomson*, the highest bidder; and the question is whether, with nothing further proved in regard to that mortgage, *Thomson* so purchasing and so holding, can be ordered to redeem the plaintiffs. I cannot see any ground whatever for such an obligation to rest upon, for it is not the inference from these facts that an equity of redemption of that mortgage either could legally be put up to sale under *Benner's fi. fa.*, with the necessary regard to his rights, or that it was such an interest that was in fact sold and conveyed.

In the cases of *Ward v. Waring (a)*, *Tweddel v. Tweddel (b)*, and other cases turning upon the position in which the purchaser of an equity of redemption stands with regard to the mortgagor came lately under the consideration of this Court, in a case of *The Bank of Upper Canada v. Brough (c)*; in which for reasons stated by me, I gave no judgment. I examined the question, however, so far as to satisfy myself that in all such

(a) 7 Vesey 332.

(b) 2 Br. Ch. Ca. 104.

(c) 2 U. C. App. 95.

cases, it must depend upon the facts in evidence in the particular case whether the purchaser by private sale of the equity of redemption can be compelled either in law or equity to pay off the mortgage; though, the estate being liable, doubtless, to the incumbrance, it is clear that he can not keep it and refuse to pay off the mortgage; he must either redeem it, or be content to be foreclosed. I speak now of cases, in which the purchaser could only have bought the equity of redemption, because there was no greater interest to be sold. For instance, a man having an estate worth £1,000 may have mortgaged it for two or three hundred pounds, and afterwards sold it to a stranger. In such cases where the parties act fairly, and have confidence in each other, though the purchaser may know of the incumbrance, he may yet treat for the purchase upon the footing of paying the actual value of the estate, and may pay it, without any deduction for the mortgage, being satisfied with the engagement of the vendor that he will pay the debt when the time comes; and he may or may not take the prudent precaution of stipulating that he is to be allowed to pay the mortgage out of the price he is to give, or require an undertaking from the vendor to save him harmless against the mortgage. In such a case he cannot be made personally liable to pay the mortgage debt, though it stands as a charge upon the land. Or they may deal upon the footing that the purchaser of the equity of redemption pays only the value of the estate, above the incumbrance; in which case the vendor will generally take care that the vendee binds himself to secure him against being made to pay the mortgage debt; and whether the purchaser does or does not enter into such engagement, if it is clear that all he paid was the value agreed to be taken, not for the land, but for the equity of redemption, then the purchaser will not only be liable to be foreclosed if he does not pay off the incumbrance, but he will be obliged by a Court of Equity to stand between the vendor and his

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1866. mortgagees, and save the latter harmless, and cannot escape the liability by merely submitting to foreclosure.

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But in all the classes of cases to which I now refer it was *an equity of redemption* that was sold, and that was the interest that was intended and known to be disposed of.

Judgment. In the case now before us, however, the judgment creditor was entitled to have the estate sold free from the mortgage, and it is not to be presumed that the Sheriff sold an equity of redemption merely, because that would be submitting to the mortgage as a binding incumbrance, though by law it could not take priority of the judgment. It required, therefore to have the clearest evidence to the express point that *Thompson* did actually agree to pay off this mortgage, and that he bid upon the understanding that he should do so, so as to leave that as part of the price. This inference does not lie upon the facts of the case, but the very contrary should be inferred, and we have no evidence that the defendant bought upon that footing, if he could indeed have been permitted to do so considering all the other judgments that were entitled to come before *Benner's* judgment.

We have, however, still to consider the two statutes referred to in the argument (12 Vic. 73, and 14 and 15 Vic. ch. 45). I have carefully examined them, and find nothing in them, which being applied to the circumstances of this case, can affect the decision.

*Thomson* did not buy the equity of redemption, being at the time either mortgagee, or assignee of the mortgage.

I think I should have been inclined to dismiss the bill, but *Thomson* having expressed his willingness, as

I understand, to rescind the purchase at Sheriff's sale, 1866.  
 or rather to give up his title under it to the plaintiffs,  
 if they will redeem the first mortgage, the Vice-Chan-  
 cellor by the decree has given the plaintiffs the option  
 to redeem him.

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VAN KOUGHNET, C.—The facts important to the principal question argued before us are few and simple. By indenture dated the 13th of April, 1858, one *John Shaw* mortgaged to one *Francis Stanton* the premises in dispute here. This indenture, as appears by the registrar's certificate, was registered on the 17th of the same month.

By indenture dated the 13th of May, 1858, *Shaw* mortgaged the same premises, or his equity of redemption therein, to one *Gillespie*, from whom the same, by assignment, became vested in the plaintiffs.

A judgment, recovered by one *Benner* and others Judgment.  
 against *Shaw* and another, was registered on the 16th of April, 1858, having thus priority of registration over the mortgage to *Stanton*, and, of course, over the mortgage to *Gillespie*, which was not executed till the following month. Upon this judgment, execution against lands issued; and, under this process, which is not impeached, the Sheriff sold the interest of *Shaw* in the premises to the defendant *Thomson*. The rights of the parties contestants are to be governed by the 2nd section of the Act 13 and 14 Victoria, chapter 63, the language of which is not open to the difficulties arising on the 13th clause of the Act 9 Victoria, chapter 34, which were discussed and disposed of by the Court of Queen's Bench in *Doe Dougall v. Fanning (a)*, and *Doe Dempsey v. Boulton (b)*. It is admitted that an *elegit* issued upon a docketed judgment in England, when docketing was in

(a) 8 U. C. 166.

(b) 9 U. C. 532.

1866. force there, related back, as against subsequent purchasers and mortgagees, to the time of the docketting, and so cut them out; but it was contended that this effect could be produced by an *elegit* only, and not by a writ of *fi. fa.* The same argument was urged in *Doe Dempsey v. Boulton*, but was rejected, and I think rightly, by the Court. We have no such process as *elegit*, and had none such at the time of the passing of the Act 9th Victoria, or afterwards. To say, therefore, that the registration of a judgment could, as against subsequent conveyances, only have effect by *elegit*, would be to deny its effect at law altogether. We must assume that the Legislature knew what descriptions of process were recognized by the Courts as in force, and they have not chosen to introduce any other. It is to be remembered that this case now resolves itself into a question of priority between a registered judgment and a subsequent conveyance, and that it is not therefore necessary to consider the relative positions of judgments registered and unregistered, nor to pronounce any opinion upon the proviso to section 13 of the Act 9th Victoria, chapter 34, as it only applies between registered and unregistered judgments. Holding that registration has at least the same effect as docketting had in England, and that it can be made operative here through a *fi. fa. de texris*, as a docketted judgment could in England by *elegit*, differing only as to the mode of executing the process, We think the decree in this case right. Some questions were raised as to the sufficiency of the proof of the facts assumed here, and upon which the judgment in the Court below proceeded, but, inasmuch as the learned Judge there proposed to allow further inquiry as to them, and the plaintiffs did not insist upon this, but consented to redeem *Thomson*, I think this must be treated as admitting his case and waiving further proof; and so also by the same consent they, I think, have abandoned the option which they were offered then of having their bill dismissed without costs, and without

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prejudice to their filing another bill impeaching the Sheriff's sale to *Thomson*, they feeling probably that *Thomson's* claim could not be pushed aside.

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I agree with my brother *Esten*, that although *Thomson* apparently misunderstood his own position, the Court, with the facts before them, are not bound to display the same ignorance. The plaintiffs have not been induced by any act of *Thomson* to alter their position.

The appeal should be dismissed with costs.

*Per Curiam.*—*Appeal dismissed with costs.*

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#### THE COMMERCIAL BANK V. WILSON.

[*Before the Hon. Sir John Beverly Robinson, Bart., Chief Justice of Upper Canada; the Hon. Chief Justice Draper; the Hon. Mr. Justice McLean; the Hon. Vice Chancellor Esten; the Hon. Mr. Justice Burns; the Hon. Mr. Justice Richards; and the Hon. Mr. Justice Hagarty.*]

#### *Judgment fraudulent in part.*

A judgment fraudulent against creditors as to part of the sum included therein is void as against such creditors *in toto*.

This was a suit by *The Commercial Bank of Canada* Statement. against *John Wilson, Andrew Hoggarth, George Moore, and James Cowan*, setting forth that on 9th May, 1859, the plaintiffs recovered judgment against the defendant *John Wilson, one McNaughton, and James Wilson*, for £330*s* 12*s*. 3*d*. and took out a *fi. fa.* against lands. They had their judgment registered on the 9th May, 1859.



1866. Before that, viz. on 17th March, 1859, *Charles Wilson* son of the said *John Wilson*, had obtained a judgment against his father for £2450, with interest and costs, and had registered his judgment on the same day.

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*Charles Wilson* died 9th August, 1859. The defendants in this suit other than *Wilson* were his executors.

The judgment obtained by the plaintiffs against *John Wilson* was on several bills of exchange which the plaintiffs had discounted; and on which *John Wilson* was liable. The plaintiffs had discounted the bills under an agreement made for the accommodation of *McNaughton* and *James Wilson*.

Statement. The plaintiffs alleged that while *John Wilson* was indebted to them in the sum for which they afterwards recovered this judgment, he fraudulently colluded with his son *Charles Wilson*, to set up a fictitious debt upon which *Charles Wilson* might recover a fraudulent and pretended judgment against him, under which his lands and goods might be protected against the plaintiffs, and the plaintiffs delayed and defeated in the recovery of their debt; that thereupon *John Wilson* made and delivered to his son *Charles Wilson* a promissory note for £2000 on which, and also another pretended debt of £450, *Charles Wilson* brought an action against his father *John Wilson*, who allowed judgment to go by default, and a final judgment was obtained which was registered according to law; and that at the time of such registration *John Wilson* was seized of certain lands described in the bill: and prayed that the judgment obtained by *Charles Wilson* against his father might be declared fraudulent and void as against the plaintiffs, and might be set aside, and that the lands might be sold by order of the Court, and the plaintiffs' debt satisfied out of the proceeds.

The defendants, the executors of *Charles Wilson*, in 1866. their answer declared that they knew nothing of the facts set forth in the bill and they referred to the answer of *John Wilson*, which they believed to be true.

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*John Wilson* in his answer gave a long account of transactions alleged to have taken place between his sons *Charles* and *James Wilson*, and himself, in consequence of which, as he alleged, the note for £2000 was made by him in favor of *Charles Wilson*. It was made, as he said, for that sum as being the assumed value of 150 acres of land which he had contracted to buy in his own name, but which on an understanding between him and *Charles Wilson* were to be the exclusive property of the latter. There was nothing in writing as he stated, to shew that *Charles* had any equitable interest in this land, or that he was bound to convey it to him when he received the legal title himself.

This note for £2000 was dated 4th April, 1855. In 1867 or 1858 *John Wilson* received a deed to himself of the 150 acres from the person who had contracted to sell the land to him; but he made no deed of it to *Charles Wilson*.

On the 15th March, 1859, *Charles Wilson* sued his father on this note for £2000 claiming interest upon it from 7th April, 1856, and he included in his particulars of demand indorsed on the process, another claim for £450 as the amount of an account rendered 5th March, 1859, in which £450 was charged for taking stones and stumps off of 100 acres of land, for *John Wilson*. Judgment was signed in this action for default of appearance.

The action at the suit of the plaintiffs was commenced on 5th March, 1859. A good deal of evidence was given in this cause respecting the alleged consideration for the £2000 note and the charge of £450 for what the

1866. witnesses called stumpage and stonage; and upon the hearing before Vice Chancellor *Esten* it was considered by him that *Charles* appeared upon the evidence to be the equitable owner of the 150 acres; that the note given by *John Wilson* to him for £2000 was really given in security for the conveyance to him of the legal estate; and that inasmuch as, in the view taken by the Court, he was always entitled to this, the note did not appear to be founded on any valuable consideration, and so the judgment obtained upon it could not be supported. But this the Vice-Chancellor regarded as only a constructive fraud, whereas the bill stated a case of actual fraud. He dismissed the bill therefore as to so much of the judgment impeached as was founded on the £2000 note, but without prejudice to filing a new bill; but as to so much of the judgment as represented the interest on the note, and the alleged debt of £450 (on the account), he held the case to be one of actual fraud, and that so far as those two charges were concerned, the judgment was fraudulent within the meaning of the Statute (13th) of Elizabeth, and should so far be set aside; that is that the plaintiffs should get no relief as to the £2000 note further than the interest upon it, but that upon a proper bill filed for that purpose it might be declared void on the ground suggested by his Honor.

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A decree was accordingly made on the 29th of April, 1861, declaring "that the judgment of *Charles Wilson* in the pleadings mentioned, is fraudulent and void as against the plaintiffs' judgment in the said pleadings also mentioned; in so far as the said first mentioned judgment is composed of interest on the note for £2000 in the said pleadings mentioned, and of the claim for £450 in the said pleadings also mentioned, and that the said judgment should be reduced as against the said plaintiffs by the said amount in taking the account hereinafter directed, and doth order and decree the same accordingly: and it is ordered that this decree is to be without

prejudice to the right of the said plaintiffs to file a new bill impeaching the said judgment in respect of the amount of the said note if they shall be advised so to do." And declaring also "that the said defendant, *John Wilson*, was, prior to the recovery of the plaintiffs' said judgment, and he has ever since continued, and now is, a trustee of the legal estate in the premises in the bill in this cause mentioned, for the late *Charles Wilson*, and his representatives, who were, and are, the beneficial owners of the same, and that the plaintiffs' said judgment does not affect the same." And in taking the accounts thereby directed, the Master was to allow to the plaintiffs, as against the defendant *John Wilson*, only such costs as would have been taxed and allowed in a suit by a judgment creditor to enforce his lien; and was to allow no costs to the plaintiffs in respect of their having made any other defendants parties, nor was he to allow to the plaintiffs any costs of the suit as against the other defendants.

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With respect to other lands of the judgment debtor, the decree contained the usual reference and other directions.

From this decree the plaintiffs appealed, on the ground that the judgment having been found to be against the Statute 13th Elizabeth, and void for actual fraud as to a part of the sum recovered by it, should have been held altogether void and set aside altogether and not in part only.

Mr. *Galt*, Q. C., and *M. A. Crooks*, for the appellants.

Mr. *Blake* and Mr. *Wells*, for the respondents.

Sir J. B. ROBINSON, Bart., C. J.—[After stating the facts to the effect above set forth.]—It is, to say the least, very suspicious that this large judgment was obtained, by the son against his father, a few days after these plaintiffs Judgment.

1866. had commenced their action against the father for large sums of money which the plaintiffs had advanced for the other son *James Wilson*, and his partner *McNaughton*, upon the father's acceptances given for their accommodation. And it is not altogether immaterial to observe that *John Wilson* was apparently so willing at that critical moment to allow his son *Charles* to recover a large judgment against him as expeditiously as possible, that he suffered the judgment to be entered against him altogether irregularly; for the endorsement of particulars of demand in the case included some years' interest upon a current account for work and labor, on which interest was not demandable of right, and the account had only been delivered a few days before; to say nothing of the absurdity and apparent want of foundation for the charge itself. The writ including such a demand could not be specially indorsed under the Common Law Procedure Act (a). By that irregularity judgment was obtained by *Charles Wilson* for default in appearance, without a trial, for his whole demand, which gave to that judgment a priority in point of time over that obtained by the Bank. This was an unfair advantage which the father seems to have been willing to give to his son. The irregularity, however, could only be taken advantage of by the defendant in the cause; and it has no other importance in this case than as it tends to shew an unfair collusion between the two to defeat the action of the plaintiff.

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I must say that I feel convinced the account given by *John Wilson* about the land, and the giving the note to represent its value in case he should not leave it by his will to *Charles*, is not to be relied on; *James Wilson's* evidence, when carefully considered, and *Cowan's* and *Mr. Ketchan's* also, leave little doubt in my mind; and the other evidence in the case strengthens the impression.

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(a) 10 Exchequer Rep. 67.

It may have been intended that *Charles* should have some of the land spoken of; and he may have been entitled to some of it fairly, by reason of the previous transactions and dealings between him, and his father and brother, if he had not in some other way received an equivalent. But it may be naturally asked if the father got his title to the 150 acres from Mr. *Dickson* before 1855, why did he not give *Charles* the deed of the land instead of giving him notes for its supposed value? If he got the deed afterwards, as it seems he did, why did he not make a conveyance to *Charles* of his land instead of allowing judgment to go against himself by default on the note? I can hardly bring myself to entertain a doubt after considering the evidence, that whenever the £2000 note may have been signed, and wherever it may have been kept for years after its date, it was first brought forward and sued upon, in order to hinder and defeat "the creditors of the father, and especially the plaintiffs in this suit, by enabling *Charles* to set up a judgment against him sufficient in amount to cover his property."

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It does not seem to me to have been quite correctly held that supposing the bill to have been otherwise framed, this note could have been held void for want of consideration, supposing all the statements of *John Wilson* to be true, on the ground that *Charles Wilson* had already an equitable interest in the 150 acres, according to his father's account of the business in his answer; for what proof is there of any trust in his favour as regards the 150 acres, at the time this note was given? He had then nothing that he could shew as a title in law or equity, though now when it suits his father, in his answer to this bill to uphold *Charles's* judgment against him, he does admit a trust. But even if he could shew that *Charles* had when this note was given, a good equitable interest in the 150 acres, of which I see no proof, I should still think that a note given to him by

1866. *Commercial Bank v. Wilson.* his father as a security that he should receive the legal title also would not be a note given wholly without consideration, for he had nothing then with which he could go into the market if he desired to sell the land, and nothing upon which he could recover in an ejectment.

The legal title could be hardly held to be of no value, and therefore of no consequence to be secured to him.

And if the note could rightly be held to have been void for want of any valuable consideration to support it, as was the Vice-Chancellor's impression when he gave judgment below, I rather think the rule is not quite so inflexible against holding a judgment void for a constructive fraud, when the case has been rested in the bill upon a charge of actual fraud, as to prevent the Court in a case of this description from giving relief on the bill as originally framed.

Judgment.

But I need say no more on this point, for we concur in the opinion, which alone disposes of this case, that the judgment having been held in the Court below, and as we think rightly, to be void as regards the charge of interest on the note which under the circumstances, there could be no just pretence for claiming, and also as regards the £450 and interest, which it is plain on the evidence was a fictitious demand merely intended to swell the amount of the judgment, it ought to have been treated as fraudulent and void altogether.

Being tainted with *actual fraud*, and to a great extent, it should not be upheld as to any part, but in the words of the Statute, 13 Elizabeth, chapter 5, section 2, being made "of fraud, collusion, and guile, with intent to delay, hinder, or defraud creditors of their just and lawful actions and debts, it must be deemed and taken (as against the plaintiffs, who are judgment creditors) *to be clearly*

*and utterly void, frustrate and of non effect."* The Court does not in such cases attempt, or as it has been said they will not condescend to go into the consideration whether any and what part of the fraudulent judgment may not have been founded in a just and legal demand. I refer to *Saunders* 66, note Q.—*Twynne's* case, 3 Co., 83 and *Thomas's* note to that case, 2nd vol. *Coke's Reports*, page 222, note w. *Hobart's Rep.* 14.

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The judgment which is made "of fraud," that is, with the fraudulent intent to defeat creditors is taken to be void altogether, without considering whether there may not be some portion of the sum for which judgment was given that was honestly due. If this was not so held the Statute would fail greatly in its effect, for then parties would be in a situation to attempt such frauds without risk of loss of anything real in case of detection.

And besides, in any case like this, when we find that a large portion of the alleged debt is evidently fictitious, it throws such suspicion upon the rest as makes it the duty of the Court to entertain all presumptions against the honesty of the case where there is any room for doubt.

Judgment.

When we see included in this judgment one charge of several hundreds of pounds for interest under such circumstances as make the demand really absurd, according to the statement made by *John Wilson* himself, and another charge of £450 and interest, of such a description as to make the honesty of it absolutely incredible, we cannot but feel that no confidence whatever can be safely placed in the statements made about the note for £2000 which formed the residue of the sum included in the judgment. There may be truth in the story about *Charles* having a claim to expect the land to be given to him, or left to him by will, but there is very strong reason for concluding that the note was



1866. *Commercial Bank v. Wilson.* merely as a contrivance to create a money claim that might be made available for covering the property of the father against the claims of creditors, whenever he might have occasion to use it; and if so, I should think the judgment as regards that part of the alleged debt would stand on no better footing than the rest of the judgment.

But the principle that under the very words of this Statute (a), the judgment if fraudulent as to part is utterly void, as against the creditor whose action is attempted to be defeated by it, puts an end to all argument. We have so applied the principle in other cases in this country and must equally do it in this.

*Judgment.* Our opinion is that the decree made must be reversed, and that the judgment in favour of *Charles Wilson* must be set aside altogether and not be allowed to interfere with the order which in the absence of such a claim it would have been proper to make in the case; plaintiffs to have the costs of the cause, but not of the appeal.

The other Judges concurred in the opinion that the judgment was void *in toto* and that the decree as to this same should be reversed.

The parties afterwards differed as to whether the Court of Appeal intended to reverse the decree as far as it declared *John Wilson* a trustee of the legal estate in the premises in the bill mentioned, for the late *Charles Wilson* and his representatives who were the beneficial owners of the same, and that the plaintiffs' said judgment did not affect the same; or so far only as it declared that the judgment of *Charles Wilson* was fraudulent and void as against the plaintiffs' judgment, in so far as the said first-mentioned judgment, is composed of interest on the

note for £2000 and of the claim for £450, and that the said judgment should be reduced against the plaintiffs by these amounts in taking the account thereby directed, and the point was spoken to more than once; but delay arose in consequence of changes in the composition of the Court. On the 15th day of March, 1867, the Court directed the order to be drawn up simply declaring that "the said judgment of *Charles Wilson* in the said pleadings mentioned is fraudulent and totally void as against the appellants."

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The plaintiffs then made this order an order of the Court of Chancery and set down the cause to be heard for directions consequent on the order. The matter came on before Vice-Chancellor *Mowat*, in January, 1868, when

Mr. *Crooks*, Q. C., for the appellants, renewed the contention that the decree as to the land in the bill mentioned should be reversed and not as to the judgment merely.

Mr. *Blake*, Q. C., contra.

MOWAT, V.C.—I have carefully read and considered, the printed papers and the judgment of the Chief Justice, and I think it quite clear, that the setting aside of the judgment *in toto* does not necessarily involve a decision, that *Charles Wilson* was not beneficial owner of the land described in the bill. The learned counsel for the defendants argued that, on a view of the whole case and of the judgment of the Chief Justice, it sufficiently appears that the Court of Appeal must have intended to reverse that part of the decree which relates to this property; but I cannot learn that the other judges so intended; and, as the decree as to this property might well have been sustained while the judgment was set aside, and the order of the Court of Appeal is expressly Judgment.

1866. confined to the judgment, I must hold that the declaration of the Vice-Chancellor as to the land described has not been interfered with. As to costs, the effect of the order in appeal, read in connection with the decree, appears to be, that the plaintiffs are entitled, as against all the defendants, to the costs of the suit so far as relates to the impeached judgment; and that there should be no costs to any party so far as relates to the ownership of the one hundred and fifty acres. The plaintiffs should also have against *John Wilson*, individually, such of the remaining costs (if any), as would have been incurred in a suit by the plaintiffs as judgment creditors to enforce their lien, had the two questions as to the validity of the judgment of *Charles Wilson*, and as to the ownership of the one hundred and fifty acres, not arisen.

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[*Before the Hon. Chief Justice Draper; the Hon. Chief Justice Richards; the Hon. V. C. Spragge;\* the Hon. Mr. Justice Hagarty; the Hon. Mr. Justice Morrison; the Hon. Mr. Justice A. Wilson; the Hon. Mr. Justice J. Wilson; and the Hon. V. C. Mowat.*]

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

DAVIES V. THE HOME INSURANCE COMPANY.

*Insurance—Insurable interest—Sale of property insured.*

The owner of a stock of goods effected an insurance thereon, and while the policy was in force assigned the property insured, and with the assent of the Company transferred the policy of insurance to *C. C.* subsequently sold the property to *M.*, who, in payment delivered his promissory notes indorsed by *L.*, who was an accommodation indorser only, upon the express agreement that the goods should be sold by *M.*, and the proceeds as received paid over to *L.* to retire the notes, and that the policy should be assigned to *L.* in trust to secure himself against the notes and pay any surplus to *M.*, and the policy was so assigned with the assent of the Company who had full knowledge of all the facts: the interest of *M.* in the goods and the liability of *L.* on the notes continued until the goods were destroyed by fire. The Company having refused payment of the amount insured, an action was brought in the name of the assured; the declaration alleged the above facts and that the plaintiff had continued to be and still was interested as trustee for *M.* and *L.*

*Held*, (reversing the decision of the Court of Queen's Bench) that the declaration shewed a good cause of action and that *L.* had an insurable interest in the goods.

This was an appeal by the plaintiff from the judgment of the Court of Queen's Bench as reported in the 24th volume of the Reports of that Court at page 364, where the pleadings are set out at length. Statement.

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\* Was absent from indisposition when judgment was pronounced.

1866. Mr. *Strong*, Q. C., and Mr. *Blake*, Q. C., for the  
appellant.

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*Co.*

Mr. *Gwynne*, Q. C., and Mr. *Galt*, Q. C., for the  
respondents.

A. WILSON, J.—This action is similar to the one which was pending between these parties in the Common Pleas; but which was only formally decided there in accordance with the prior judgment of the Queen's Bench in this case. I had independently of this case therefore, to give the matter a good deal of consideration, which is the reason I have now stated my views at more length than I should otherwise have done.

The facts before us are that *Linton* indorsed the notes which *McMillan* gave to *Claxton* for the goods, the subject of insurance sold by *Claxton* to *McMillan*.

Judgment.

These notes are not expressly stated to have been negotiable, and if they were not in fact so, then *Linton* had no insurable interest because he was never liable: *Palmer v. Pratt* (a), *Clay v. Harrison*, (b).

They may perhaps be assumed to be negotiable instruments, and a legal liability may be assumed against *Linton* to have arisen in respect of them, for it is stated he indorsed the notes and therefore that it was such an indorsation as is valid and onerary in law. No exception was taken in the Court below and I do not feel called upon to say more on the point.

Passing then over this, the facts further are that beside the indorsation by *Linton* it was agreed between *Claxton*, *McMillan*, and *Linton*, and it formed part of the consideration for the sale and assignment of the

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(a) 2 Bing. 185.

(b) 10 B. & C. 99.

goods that the policy should be assigned by *Claxton* to *Linton* in trust to secure *Linton* against loss from his indorsations and to secure the payment of the notes, and after the payment thereof then in trust for *McMillan*; and that the policy, in pursuance of this agreement, was, with the consent of the defendants in writing indorsed on the policy, assigned by *Claxton* to *Linton* in trust as aforesaid.

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And the question, which was the only one argued in the Court below, is whether *Linton* has or had an insurable interest in the goods in question?

*McMillan* was the purchaser of the goods and the principal debtor. *Linton* was his surety merely; as such surety he could not have, and it is not pretended that he had, an insurable interest; but this was not the sole relationship of these parties towards each other, for upon the purchase by *McMillan* and the indorsation by *Linton*, it was verbally agreed between them that the goods in question should be sold by *McMillan* and the proceeds as they were received by him should be paid<sup>o</sup> over by him to *Linton* to be by *Linton* applied in relief of himself and in payment of the notes; and as *Claxton* was a party to this agreement it may be that *Linton* became a trustee for *Claxton* for the proceeds of the notes which he so received.

Judgment.

The further relationship between them was that *McMillan* was a fiduciary to some extent for *Linton*, with respect to the goods or the proceeds of the goods, until he paid over the proceeds to *Linton* and then *Linton* would be in the nature of a trustee for *McMillan* as to the application of the proceeds towards the reduction and payment of the debt. And as to the policy, *Linton* was the holder of it in trust for himself and *McMillan*, till the notes were paid, and then in trust for *McMillan* solely as to the surplus.

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This was their real position towards each other, and if all that was done and all that was agreed upon had been reduced to writing, this is the actual state of things which that writing would have disclosed.

The want of writing makes no difference in point of law, for the trust may be averred, or may be by parol only, as the subject of the trust is merely personal property: *Bayley v. Boulcott* (a).

The declaration here shews that the policy was not required to go with the goods, for in different places it appears the policy and the property might be separately held, and no rule of law is against this; for change of property which takes place after the insurance made will not at all affect the right to recover on the policy, if it were the intention of the parties to continue it, unless such change has been made in direct violation of any of the conditions of the policy (b).

Judgment.

*Davies* might therefore have kept this policy all through in his own hands by special agreement for the benefit of *Claxton*, and in turn for *McMillan* and *Linton*, or for either of them. *Claxton* also might have done the same, or what is in my opinion the same in this equitable kind of proceeding, he might have assigned it just as he has done to *Linton* on behalf of and as agent for *McMillan*, and the declaration as it is framed will support just such a case. There can be no special virtue in an assignment in fact to *Linton*, for it is all of no avail at law, as *Davies* continues, notwithstanding the assignment, to be the only legal holder and owner of it.

(a) 4 Russ. 347.

(b) *Pawles v. Innes*, 11 M. & W. 10; *Sparkes v. Marshall*, 2 B. N. C. 761.

The whole facts shew that the parties never intended to let the policy drop, but that it was to be kept on foot for the benefit of *McMillan* and *Linton* or of one of them; with whom or between whom the whole property in the goods lay.

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The subject of insurance must be properly described, but the nature of the interest may in general be left at large: *Crowley v. Cohen* (a).

It is a matter of fact whether on the transfer of property the policy has also been transferred, for a policy does not pass with the property from vendor to vendee, by the mere fact of sale: *Poole v. Adams* (b). Nor is the unpaid vendor entitled to the benefit of a policy effected by the vendee: *Neale v. Reid* (c).

I am not sure this action would have failed even if *Linton* had not had an insurable interest, because it appears in the declaration that all parties intended to keep alive the policy for the protection of the goods covered by it, and an interest does appear to be plainly in some one, either in *Linton* or in *McMillan*, and in which of them, unless the policy make it imperatively necessary that the precise interest and the person in whom that interest is vested should appear, is not I think of any consequence.

Judgment.

The rule of Trinity Term, 1856, No. 9, provides that the interest of the assured may be averred thus: "That A. B. C. & D. [or some or one of them, were or was interested, &c.,] and it may also be averred that the insurance was made for the use and benefit and on the account of the person so interested."

The definition of an insurable interest may perhaps

(a) 3 B. & Ad. 478.

(b) 12 W. R. 683.

(c) 1 B. & C. 657.



1866. *Davis v. Home Ins. Co.* be sufficiently stated from the observation of Lord *Eldon* in *Lucena v. Crawford* (a), from which it would appear it need not be so great as a certainty, and must not be so low as a mere expectancy, and he adds: "nor am I able to point out what is an interest unless it be a right in the property or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or engagement of the party," many others might be stated, but they are very fully referred to in the judgment of the Court below.

I shall only add further, the one given in *Seagrave v. The Union Marine Insurance Company* (b): "The general rule is now that to constitute interest insurable against a peril it must be an interest such that the peril would by its proximate effect cause damage to the assured." It may aid a good deal by shewing what may be the subjects of insurance; the following are some of them:

Judgment.

FREIGHT.—*Flint v. Flemyng* (c), *Devaux v. J'Anson* (d).

MONEY ADVANCED ON FREIGHT.—*Mansfield v. Maitland* (e).

PROFITS ON CARGO.—*Barclay v. Cousins* (f), *McSwiney v. The Royal Exchange Assurance Co.* (g).

PROFITS OF A BUSINESS.—*Wright v. Pole* (h).

SALVAGE PAID BY THE OWNER.—For he has a lien for the same on the goods: *Briggs v. Traders' Association* (i).

(a) 2 N. R. 321.

(c) 1 B & Ad. 45.

(e) 4 B. & A. 582.

(g) 14 Q. B. 634.

(b) L. R. 1 C. P. 320.

(d) 5 B. N. C. 519.

(f) 2 East 544.

(h) 1 A. & E. 621.

(i) 13 Q. B. 174.

CONSIGNMENTS.—Though consignees have only a 1866. defeasible interest, for the goods may be stopped *in transitu*, or the consignees may be changed: *Sterling v. Vaughan* (a), *Boehm v. Bell* (b), *Lucena v. Crawford* (c).

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A PAWN OF GOODS, created by indorsement of Bill of Lading: *Sutherland v. Pratt* (d).

A PLEDGE OF BILL OF LADING.—*Ibid.*, and *Welfe v. Horncastle* (e).

HYPOTHECATION OF VESSEL.—Though by such an instrument the creditor has no property in the vessel, but a claim or privilege only to be enforced by the process of the Court: *Stainbank v. Fenning* (f), *Stainbank v. Shepard* (g).

GOODS IN WAREHOUSE.—May be insured to full value by warehouseman, as he will be a trustee for the owner above his own interest: *Walters v. The Monarch Assurance Co.* (h). Judgment.

GOODS CONSIGNED to one to be delivered to another, may be insured by the one to whom they are to be delivered, though he did not order them to be sent: *Hill v. Secretan* (i), *Lucena v. Crawford* (j).

“INCHOATE RIGHTS, founded on subsisting titles unless forfeited by positive law are insurable; freight, *respondentia* and bottomy are of this description, the profit is prospective, but they are founded on existing charter parties, bonds, and agreements”: *Lucena v. Crawford* (k).

(a) 11 East 628.

(c) 2 N. R. 298.

(e) 1 B. & P. 823.

(g) 18 C. B. 438, 442.

(i) 1 B. & P. 315.

(b) 8 T. R. 158, 161.

(d) 12 M. & W. 16.

(f) 11 C. B. 88.

(h) 5 E. & B. 881.

(j) 2 N. R. 291, 292.

(k) 2 N. R. 294.

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SHIPS SEIZED BY THE OFFICERS OF THE CROWN AS PRIZE OF WAR, before condemnation, though they may be restored by the Crown before condemnation: *Crawford v. Hunter* (a), *Boehn v. Bell* (b), *LeCras v. Hughes* (c), *Sterling v. Vaughan* (d).

A COVENANT TO INSURE will give an interest that is an insurable interest, though the covenantor have no other legal or equitable interest in the subject to be insured, *Heckman v. Isaac* (e), in which it was held that an agreement to sell an expectancy by will for so much money or to repay the money, in which case the party had no other interest in the life or death of the person from whom the expectation arose than was created by the agreement to sell, had such an interest in the life of the expected deviser as to prevent the policy (if the transactions were to be considered as an insurance) from being considered a gaming or wagering policy prohibited by the Statute.

Judgment.

A BILL OF EXCHANGE DRAWN FOR FREIGHT which therefore pledges the freight, is an equitable assignment of the freight, and consequently creates an insurable interest (f). The American cases, which have been referred to, strongly and directly support the same doctrine of law.

In applying these rules and principles, it appears to me, that as there was a good consideration by reason of the indorsements for the right which *Linton* had to receive the proceeds of the goods and to apply them for his own protection, so far as that was necessary, there was an equitable lien or right of lien or interest in these identical goods to have them applied to the trust and

(a) 8 T. R. 13.

(b) 8 T. R. 154.

(c) 8 Dougl. 81.

(d) 11 East 619.

(e) 6 L. T. N. S. 383, and see the very singular case of *Cook v. Field*, 15 Q. B. 460.(f) *Wilson v. Martin*, 11 Exch. 684.

object for which the parties had expressly provided, and therefore there was an insurable interest in *Linton*. An interest quite as strong and stronger than in many of the cases before mentioned, and an interest quite sufficient according to the terms and definition of what will constitute an insurable interest.

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It has been doubted, though not argued, whether such a case has been stated on the record as will entitle the plaintiff to judgment. Whether such a compliance has been averred by the transferees with the conditions of the policy as shew that they have duly performed all conditions precedent and done all such things as to entitle them to maintain this action.

There is the general averment of all conditions having been fulfilled and of all things having happened to entitle the plaintiff to bring his action.

I believe exception is taken to that part of the declaration which sets out the condition that, "if the property to be insured be held in trust or on commission, or be a leasehold or other interest not absolute, it must be so represented to the defendants, and expressed in the policy in writing, otherwise the insurance as to such property shall be void," it being contended that *Linton* did not represent to the defendants that the property which he insured was in respect of an "interest not absolute," and that *this* interest was "not expressed in the policy in writing," and therefore that the insurance was void. Judgment.

The declaration does shew the exact transaction between *Claxton*, *McMillan*, and *Linton* before mentioned, and it then proceeds "and the said policy in pursuance of such agreement with the consent of the defendants obtained in writing on the said policy, was then assigned by *Claxton* to *Linton* in trust as aforesaid, and for the purpose aforesaid, and the defendants before and at the time of such consent had full knowledge and notice of all the facts aforesaid."

1866. It may therefore be assumed that *Linton* did represent to the defendants that his interest was not absolute in the goods, but perhaps it cannot be assumed that this limited interest was expressed in the policy in writing.

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But does it therefore follow that this insurance is void? Does this provision apply to an assignment of the policy, or only to the original policy? If only to the original policy, then this insurance is not void.

The clause reads, if the property "to be insured be held in trust, &c." Now this property is not *to be insured*, for it had been already and was at the very time of the assignment actually insured. Then again the provision that the limited interest shall be expressed "in the policy in writing," cannot apply; firstly, because the limited interest does not relate to the case of an assignment, and secondly, because *the policy* is not then to be altered.

Judgment.

There are special provisions as to assignments, quite distinct from those which apply to the making of the original insurance, and the clause just referred to can no more be held to relate to an assignee, than that other clause in the declaration which states that "*application for insurance* must be in writing and must specify the construction and materials of the buildings to be insured," &c. These clauses I think do not extend to, and were not intended to extend to, any such case, and no good purpose can be served by giving them so wide a reference: *Richardson v. The Canada Farmers' Mutual Insurance Company (a)*.

The construction to be placed upon a policy should have relation to the condition of things as they were at

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(a) 17 U. C. C. P. 483.

the time of the making of the policy, unless there be something in it requiring a different construction to be put upon it *Tindal*, C. J. in *Sparkes v. Marshall* (a) said "if the plaintiff had an insurable interest at the time the policy was effected whatever change may have taken place in the property in the oats since, can have no effect in relieving the underwriters from their liability, as the plaintiff may sue on the policy for the benefit of the party to whom such property has passed \* \* the question turns upon the right of the plaintiff at the time of effecting the policy to the specific cargo of oats on board the Gibraltar packet." The plaintiff in this case had a good insurable interest and conformed to all the provisions of the policy; at the time when he procured it to be made, it was valid and available in his hands, and nothing which I can see has been done with it or with the property insured by it, contrary to any of its terms or conditions. There is no reason therefore in my opinion why the plaintiff should not recover the amount of it; firstly, because there was a valid subsisting insurable interest transferred to and vested in *Linton*, and secondly, because the record discloses a title not defectively but sufficiently stated.

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*Per Curiam*.—Appeal allowed and judgment of the Court before reversed.

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(a) 2 B. N. C. 771.



# AN INDEX

TO THE

## PRINCIPAL MATTERS.

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### ACCOUNT.

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### CORPORATION.

*Held per Curiam*—[RICHARDS, C. J., WILSON, J., and MOWAT, V. C. dissenting]—that a municipal corporation is not entitled (like a public officer) to a month's notice before action brought against the municipality in respect of any act of the corporation: nor is a party aggrieved by such act bound to commence his action within six months from the committing of the act complained of.

Hodgins v. The Corporation of the United Counties of Huron and Bruce, 169.

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### DELAYING CREDITORS.

See "Insolvent."

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### FL. FA. LANDS.

(TIME FOR RENEWING.)

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### FORFEITURE OF STOCK.

To an action by a judgment creditor of the Port Hope, Lindsay and Beaverton Railway Company against a share-



holder for the amount of his unpaid stock, the defendant set up that the full amount of stock required by the act of incorporation had never been subscribed, or the first instalment paid thereon; that the original design of the company had been changed by statute after the defendant subscribed; that the stock subscribed for by the defendant had long since become forfeited for non-payment of calls; that on the 14th of May, 1853, the directors passed a resolution declaring that the shares mentioned in a schedule intended to be annexed (but which was not annexed) to the resolution, which had become forfeited by non-payment of call made on the previous 21st of January, should be sold on the 20th of June, unless previously redeemed; and that the company had not afterwards treated the defendant as a shareholder, nor had he acted as such. The resolution for sale of the stock had not been acted on by the company, a statute having been passed before the day named for sale making new provisions as to forfeiture or abandonment of shares which had not been complied with.

*Held*, that the defendant was still liable as a shareholder.

Smith v. Lynn, 201.

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### FRAUDULENT CONVEYANCE.

Where an insolvent person who was pressed by his creditors, and contemplated leaving the country in consequence of his embarrassments, made a conveyance of all his tangible property for an inadequate consideration to a relative who was aware of his circumstances, the conveyance was set aside as against creditors.

Crawford v. Meldrum, 101.

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### FRAUDULENT JUDGMENT.

(IN PART.)

See "Judgment fraudulent in part."

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### INSOLVENT—BONA FIDE SALE BY.

Where traders, on the eve of insolvency, and after service of process at the suit of one of their creditors, sold all their stock-in-trade to a purchaser, from whom they accepted promissory notes at long dates, but the jury found that such sale was made *bonâ fide*, and with a view of enabling the insolvents to divide the proceeds among their creditors equally:

*Held*, affirming the judgment of the court below, that such sale was valid; but, if the sale had been made with intent, by

vendor and purchaser, to defeat or delay creditors, it would have been void, though made *bond fide* with the intention of passing the property.

Gottwalls v. Mulholland, 194.

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### INSURABLE INTEREST.

See "Insurance."

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### INSURANCE.

The owner of a stock of goods effected an insurance thereon, and while the policy was in force assigned the property insured, and with the assent of the Company transferred the policy of insurance to *C. C.* subsequently sold the property to *M.* who, in payment delivered his promissory notes indorsed by *L.*, who was an accommodation indorser only, upon the express agreement that the goods should be sold by *M.*, and the proceeds as received paid over to *L.* to retire the notes, and that the policy should be assigned to *L.* in trust to secure himself against the notes and pay any surplus to *M.*, and the policy was so assigned with the assent of the Company who had full knowledge of all the facts; the interest of *M.* in the goods and the liability of *L.* on the notes continued until the goods were destroyed by fire. The Company having refused payment of the amount insured, an action was brought in the name of the assured; the declaration alleged the above facts and that the plaintiff had continued to be and still was interested as trustee for *M.* and *L.*

*Held*, (reversing) the decision of the Court of Queen's Bench that the declaration shewed a good cause of action and that *L.* had an insurable interest in the goods.

Davies v. The Home Insurance Co., 269.

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### JUDGMENT FRAUDULENT IN PART.

A judgment fraudulent against creditors as to the sum included therein is fraudulent as against them *in toto*.

The Commercial Bank v. Wilson, 257.

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### JURISDICTION.

See "University."

## PARTNERSHIP.

## LEASE.

See "Parol Evidence," 1.

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## MORTGAGE.

Land subject to two mortgages was sold for 20s. under a writ of *fi. fa.* issued on a prior registered judgment, and the purchaser subsequently bought up the first mortgage. The holders of the second mortgage having filed a bill, praying foreclosure, on the ground that under the circumstances the purchaser at Sheriff's sale was bound to pay off both mortgages; the Court refused this relief, and on appeal the decree was affirmed.

The Bank of Montreal v. Thomson, 239.

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## NOTICE OF ACTION.

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## PAROL AGREEMENT.

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## PAROL EVIDENCE.

A lease, dated 15th March, 1862, was, in July of the same year, altered in several respects and re-executed by the parties thereto; the date remaining the same, and a memorandum was signed cancelling the first lease.

*Held*, affirming the judgment of the Court below, that the lease spoke from the day of re-execution, not from the day of its date; and that the provisions of the lease, in connection with the surrounding circumstances, did not afford sufficient evidence of a contrary intention to justify a different construction. [*Spragge, V. C., A. Wilson, J. and Mowat, V. C., dissenting.*]

Bell v. McKindsey, 9.

See also "Sheriff's Sale."

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## PARTNERSHIP.

An agreement between two persons that they should carry on business as co-partners in the sole name of one of the two, the other being in debt, and wishing by this means to keep the property from his creditors, does not exempt the partner whose

name was used from rendering an account of the partnership dealings to his co-partner.

Brigham v. Smith, 46.

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### PRACTICE.

1. On a reference to arbitration at *Nisi Prius* the order required the arbitrator, at the request of either party, to state any special facts for the opinion of the Court; and the Court was thereupon empowered to direct the verdict to be altered or amended, as the Court might think proper. The arbitrator having stated a case for the opinion of the Court, the Court made a rule thereon, and an appeal was brought against the judgment or decision expressed in the rule.

*Held*, that no appeal would lie, and that as judgment had not been entered, error could not be brought.

Mills v. King, 120.

2. Where shortly before the return day of a *fi. fa.* against lands, the plaintiff therein obtained it from the Sheriff for the purpose of renewing the writ, and did not return it for fifteen days, when a year from the teste had expired; *Held*, that these circumstances did not amount to an abandonment of the plaintiff's rights under the execution.

Meneilly v. McKenzie, 209.

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### PROFESSOR.

(RENEWAL OF.)

See "University."

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### RAILWAY COMPANY.

(LIABILITY FOR SAFE CARRIAGE OF LUGGAGE.)

*Held*, affirming the judgment of the Court below, that the mere fact of a passenger, travelling in a railway carriage, retaining possession of a bag or other small article of luggage, did not, without some evidence of contract, express or implied to that effect, relieve the company from their liability as common carriers in case of loss. [*Morrison, J.*, dissenting.]

Gamble v. The Great Western Railway Co., 163.

See also "Forfeiture of Stock."

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### REGISTERED JUDGMENT.

(SALE UNDER FI. FA. ISSUED ON.)

See "Mortgage."

## REMOVAL OF PROFESSOR.

See "University."

## SALE OF PROPERTY INSURED.

See "Insurance."

## SHERIFF'S SALE.

*A.* entered into a parol agreement with *R.*, for the sale to him of certain land, received part of the price and gave *R.* possession of the premises. *A.* subsequently assigned by parol the balance of the price to *S.*, to whom he was indebted. *P.*, after this assignment, delivered to the Sheriff an execution against the lands of *A.*, and became the purchaser at the sale by the Sheriff of the lands so agreed to be sold to *R.*

*Held*, that under these circumstances no interest in the land passed under the Sheriff's deed.

Parke v. Riley, 215.

(UNDER FI. FA. ISSUED OF REGISTERED JUDGMENT.)

See "Mortgage."

## SPECIFIC PERFORMANCE.

The Rector of Woodstock filed a bill against the Great Western Railway Company for a specific performance of an alleged contract for a free pass for himself and his successors, as the consideration for certain rectory land conveyed by the plaintiff to the company for railway purposes. The Court of Appeal, not being satisfied with the evidence of the alleged contract, and also deeming the contract to be open to various objections, reversed the decree, and ordered the bill to be dismissed with costs. [*Spragge and Mowat*, V.C.C., dissenting.]

Bettridge v. The Great Western Railway Co., 58

## ULTRA VIRES.

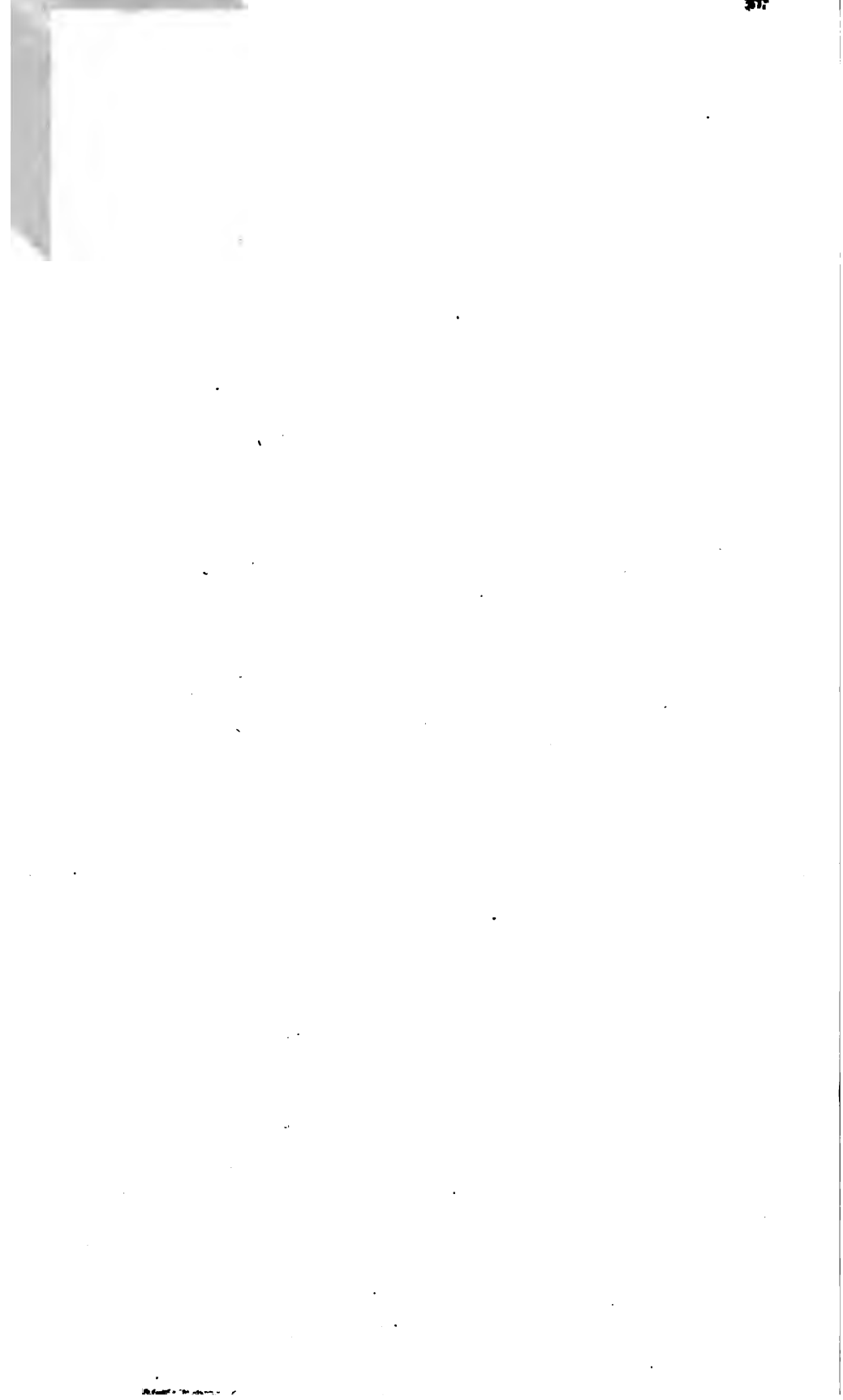
See "Specific Performance."

## UNIVERSITY.

The trustees of Queen's College, Kingston, removed a professor in their discretion. *Held*, reversing the judgment of the Court below, that there was no jurisdiction in equity to interfere for his restoration, &c., and that, under the charter, a sufficient number of trustees might remove in their discretion.

Weir v. Mathieson, 123.











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